(1)

Supreme Court, U.S.
FILED

021186 FEB 6 2003

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO, AS TRUSTEES FOR GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO TRUST; AMERICAN FARM BUREAU FEDERATION; CALIFORNIA FARM BUREAU FEDERATION; MENDOCINO COUNTY FARM BUREAU,

Petitioners,

v.

WAYNE NASTRI, REGIONAL ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 9; CHRISTIE WHITMAN, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

TIMOTHY S. BISHOP
SUSAN E. BRICE
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

JEFFREY W. SARLES
Counsel of Record
RUSSELL R. EGGERT
CRISTINA CARMODY TILLEY
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

Counsel for Petitioners
[Additional counsel listed on inside cover]

117 pp

JOHN J. RADEMACHER
American Farm Bureau Federation
225 Touhy Avenue
Park Ridge, IL 60068
(847) 685-8600

NANCY N. MCDONOUGH
California Farm Bureau Federation
2300 River Plaza Drive
Sacramento, CA 95833
(916) 561-5500

QUESTIONS PRESENTED

Section 303(d)(1) of the Clean Water Act, 33 U.S.C. § 1313(d)(1), requires each State to identify those waters within its boundaries for which specified "effluent limitations * * * are not stringent enough to implement any water quality standard applicable to such waters," and to establish total maximum daily loads ("TMDLs") of pollutants for those waters. Although effluent limitations are by definition applicable only to waters impaired by point sources, the Environmental Protection Agency ("EPA") requires each State to identify and establish TMDLs for *all* its waters not meeting water quality standards, including waters not impaired by point sources and thus not subject to effluent limitations at all. On that basis, EPA imposed TMDLs on numerous California waters impaired only by nonpoint sources. The Ninth Circuit, before analyzing the meaning of the statutory provision, held that EPA's construction was entitled to *Chevron* deference. The questions presented are:

1. Whether § 303(d)(1) requires a State to identify all sub-standard waters within its boundaries, including those impaired only by nonpoint sources, and establish TMDLs for those waters.

2. Whether the court below violated this Court's precedents by deferring to EPA's construction of § 303(d)(1) before analyzing the meaning of that provision.

3. Whether permitting EPA to establish TMDLs for waters impaired only by nonpoint sources and thereby impose corresponding land use controls constitutes an impermissible federal intrusion into a core State function without a clear statement from Congress.

RULE 29.6 STATEMENT

None of the petitioners has a parent corporation or a non-wholly owned subsidiary, and no publicly held corporation owns 10% or more of any petitioner's stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 6

I. The Decision Below Conflicts With This Court's Precedents Barring Deference To An Agency's Statutory Construction Where The Textual Meaning Is Clear. 7

A. The Ninth Circuit impermissibly determined that it must defer to EPA before analyzing the meaning of the statute 7

B. By its plain terms, § 303(d)(1) applies only to sub-standard waters polluted by point sources. 8

C. The plain text meaning of § 303(d)(1) is confirmed by the statutory structure, legislative history, and statutory purpose. 11

D. EPA's construction of § 303(d)(1) is unreasonable. 16

II. The Ninth Circuit Construed An Important Federal Regulatory Statute In A Way That Conflicts With Relevant Decisions Of This Court. 19

TABLE OF CONTENTS – continued

Page

A. The 1972 Congress was focused on reducing point source pollution. 19

B. Congress allocated responsibility over nonpoint source pollution to the States. 21

III. Whether Congress Authorized EPA To Regulate Waters Impaired Only By Nonpoint Sources Is An Important Question Of Federal Law That Should Be Promptly Settled By This Court. 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

American Iron & Steel Inst. v. *EPA*, 115 F.3d 979 (D.C. Cir. 1997) 16

Appalachian Power Co. v. *Train*, 545 F.2d 1351 (4th Cir. 1976) 19

Arkansas v. *Oklahoma EPA*, 503 U.S. 91 (1992) 26

AT&T v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999) 26

BankAmerica Corp. v. *United States*, 462 U.S. 122 (1983) 16

Barnhart v. *Sigmon Coal Co.*, 534 U.S. 438 (2002) 8

Board of Gov. of Fed. Res. Sys. v. *Dimension Fin. Corp.*, 474 U.S. 361 (1986) 15

Borden Ranch P'ship v. *United States Army Corps of Eng'rs*, 123 S. Ct. 599 (2002) 26

Brown v. *Gardner*, 513 U.S. 115 (1994) 11

Chemical Mfrs. Ass'n v. *NRDC*, 470 U.S. 116 (1985) 26

Chevron U.S.A., Inc. v. *NRDC*, 467 U.S. 837 (1984) 5, 6, 7

Christensen v. *Harris County*, 529 U.S. 576 (2000) 18

Circuit City Stores, Inc. v. *Adams*, 532 U.S. 105 (2001) 10

City of Columbus v. *Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. 2226 (2002) 23

TABLE OF AUTHORITIES – continued

Page(s)

City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981) 26

Commissioner v. *Engle*, 464 U.S. 206 (1984) 16

Consumer Prod. Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 8

Duncan v. *Walker*, 533 U.S. 167 (2001) 9

E. I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112 (1977) 26

Environmental Defense Fund, Inc. v. *Costle*, 657 F.2d 275 (D.C. Cir. 1981) 20

EPA v. *California*, 426 U.S. 200 (1976) 16, 19, 26

FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 7

FERC v. *Mississippi*, 456 U.S. 742 (1982) 22

FPC v. *Panhandle E. Pipe Line Co.*, 337 U.S. 498 (1949) 16

Friends of the Earth, Inc. v. *Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167 (2000) 26

Great-West Life & Annuity Ins. Co. v. *Knudson*, 122 S. Ct. 708 (2002) 10

Gwaltney, Ltd. v. *Chesapeake Bay Found.*, 484 U.S. 49 (1987) 26

Hawes v. *Oregon*, No. 00-198, slip. op. 8 (Or. Cir. Ct., Baker County, Dec. 9, 2002) 25

Hess v. *Port Auth.*, 513 U.S. 30 (1994) 22

International Paper Co. v. *Ouelette*, 479 U.S. 481 (1987) 26

TABLE OF AUTHORITIES – continued

Page(s)

Jones v. *United States*, 529 U.S. 848 (2000).....24

Kawaauhau v. *Geiger*, 523 U.S. 57 (1998).....13

Mertens v. *Hewitt Assocs.*, 508 U.S. 248 (1993).....15

Middlesex County Sewerage Auth. v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981).....26

National Broiler Marketing Ass'n v. *United States*, 436 U.S. 816 (1978).....25

National Wildlife Fed'n v. *Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).....17

New York v. *United States*, 505 U.S. 144 (1992).....24

NRDC v. *Costle*, 564 F.2d 573 (D.C. Cir. 1977).....12

Olmstead v. *Zimring*, 527 U.S. 581 (1999).....25

Public Lands Council v. *Babbitt*, 529 U.S. 728 (2000).....26

PUD No. 1 v. *Washington Dep't of Ecology*, 511 U.S. 700 (1994)).....20, 21, 23, 26

Reliance Elec. Co. v. *Emerson Elec. Co.*, 404 U.S. 418 (1972).....25

Solid Waste Agency v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001).....*passim*

Stevens v. *Dep't of Treasury*, 500 U.S. 1 (1991).....25

Stone v. *INS*, 514 U.S. 386 (1995).....13

TABLE OF AUTHORITIES – continued

Page(s)

Train v. *Campaign Clean Water, Inc.*, 420 U.S. 136 (1975) 26

Train v. *Colorado Public Interest Group*, 426 U.S. 1 (1976) 26

United States v. *Alaska*, 521 U.S. 1 (1997) 9

United States v. *Leslie Salt Co.*, 350 U.S. 383 (1956) 18

United States v. *Mead Corp.*, 533 U.S. 218 (2001) 17

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 26

United States v. *Ruzicka*, 329 U.S. 287 (1946) 25

Statutes & Regulations

Clean Water Act, 33 U.S.C. § 1251 *et seq.*:

Section 101(a), 33 U.S.C. § 1251(a) 15
Section 101(b), 33 U.S.C. § 1251(b) 6, 23
Section 208, 33 U.S.C. § 1288 ..... *passim*
Section 208(b), 33 U.S.C. § 1288(b) 3, 12
Section 301, 33 U.S.C. § 1311 3
Section 301(b), 33 U.S.C. § 1311(b) 8, 9, 14
Section 301(e), 33 U.S.C. § 1311(e) 3
Section 303, 33 U.S.C. § 1313 3
Section 303(d), 33 U.S.C. § 1313(d) ..... *passim*
Section 303(e), 33 U.S.C. § 1313(e) 4
Section 304(a), 33 U.S.C. § 1314(a) 10
Section 304(f), 33 U.S.C. § 1314(f) 11
Section 305(b), 33 U.S.C. § 1315(b) 11
Section 319, 33 U.S.C. § 1329 ..... *passim*
Section 319(a), 33 U.S.C. § 1329(a) 12, 13

TABLE OF AUTHORITIES – continued

Page(s)

Section 402, 33 U.S.C. § 1342 ..... 3, 17
Section 502(11), 33 U.S.C. § 1362(11) 3, 8
Section 502(14), 33 U.S.C. § 1362(14) 3

Clean Water Act Amendments of 1977, 91 Stat. 1566 (1977) 3

Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 (1972) 3, 12

Water Quality Act of 1987, 101 Stat. 7 (1987) 3

40 C.F.R. § 122.62(a) 20

Other Authorities

Susan Bruninga, *House Panel Members Question EPA Authority to Issue TMDL Proposal*, 30 Env't Rep. (BNA) 1241 (Nov. 5, 1999) 28

117 Cong. Rec. 38825 (1971) 22

EPA, *Fact Sheet on "The National Costs of the Total Maximum Daily Load Program (Draft Report),"* http://www.epa.gov/owow/tmdl/coststudy/costfact.html 27

EPA, *Federal Appeals Court Upholds Landmark Clean Water Decision*, Region 9 News Release (June 3, 2002), http://www.epa.gov/owow/tmdl/lawsuit.html 27

EPA, *Nonpoint Source Guidance (1987)*, in CLEAN WATER DESKBOOK 173 (1991) 17

EPA, *Overview of the Total Maximum Daily Load Program*, http://www.epa.gov/owow/tmdl/tptmdl 27

TABLE OF AUTHORITIES – continued

Page(s)

EPA, *Report of the Federal Advisory Committee on the Total Maximum Daily Load (TMDL) Program* (July 1998) 19

50 Fed. Reg. 1774 (Jan. 11, 1985) 17

65 Fed. Reg. 75699 (Dec. 4, 2000) 27

G. Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law*, 23 U.C. Davis L. Rev. 461 (1990) 21

2 F. Grad, TREATISE ON ENVIRONMENTAL LAW § 3.03[4][n] (2000) 12, 15

H.R. Rep. No. 92-911 (1972), reprinted in 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (1973) 14

Houck, THE CLEAN WATER ACT TMDL PROGRAM (1999) 19

R. Lazarus, *Nonpoint Source Pollution*, 2 Harv. Envtl. L. Rev. 176 (1977) 22

Letter to President Clinton from National Governors Ass'n, July 6, 2000, http://www.nga.org/nga/legislativeUpdate/1,1169, C_LETTER%5ED_1077,00.html 27

J. Montgomery, *Control of Agricultural Water Pollution: A Continuing Regulatory Dilemma*, 1976 U. Ill. L.F. 533 21

John Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 Harv. Envtl. L. Rev. 365, 386-410 (2002) 22

TABLE OF AUTHORITIES – continued

Page(s)

Zygmunt Plater et al., ENVIRONMENTAL LAW AND POLICY (2d ed. 1998) 22

Proposed Revisions to the Water Quality Planning and Management Regulation, 64 Fed. Reg. 46012 (Aug. 23, 1999) 28

2A N. Singer, STATUTES AND STATUTORY CONSTRUCTION § 47.23 (6th ed. 2000) 11

Henry Stephens & Monica Dias, *TMDLs for Nonpoint Sources in Kentucky: The Potential Impact of* Pronsolino v. Marcus, 16 J. Nat. Resources & Envt'l L. 1 (2002) 23

Withdrawal of Revisions to the Water Quality Planning and Management Regulation, 67 Fed. Reg. 79020 (Dec. 27, 2002) 28

D. Zaring, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 Harv. Envtl. L. Rev. 515 (1996) 21

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Guido A. Pronsolino and Betty J. Pronsolino, as Trustees for the Guido A. Pronsolino and Betty J. Pronsolino Trust; American Farm Bureau Federation; California Farm Bureau Federation; and Mendocino County Farm Bureau, respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-31a) is reported at 291 F.3d 1123. The order of the court of appeals denying petitioners' petition for rehearing or rehearing en banc (App., *infra*, 32a) is unreported. The opinion of the district court (App., *infra*, 33a-71a) is reported at 91 F. Supp. 2d 1337.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2002. Petitioners' timely petition for rehearing was denied on October 9, 2002. On December 20, 2002, Justice O'Connor granted an extension of time to file this petition to February 6, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), is set forth at App., *infra*, 72a-74a.

STATEMENT

Introduction. This case raises a critical question under an important federal regulatory statute, the Clean Water Act ("CWA"). The 1972 legislation initiating the CWA sought to "restore and maintain the * * * the integrity of the Nation's waters" and provided a variety of mechanisms allocated to the Federal government and the States to achieve that purpose. The States were to address "nonpoint source"

pollution, such as agricultural run-off, through regional land and water use plans. The Federal government was to regulate "point source" pollution, that is, discharges from discrete conveyances, primarily through technology-based effluent limitations. The 1972 legislation called for increasingly stringent effluent limitations where necessary to achieve water quality goals. The statutory mechanism for calculating those more stringent limits is a "total maximum daily load" ("TMDL"). A TMDL represents the maximum amount (or "load") of a specified pollutant that can be added to a water body without reducing water quality below the applicable standard.

The question at issue is whether the Environmental Protection Agency ("EPA") may require the States to identify and develop TMDLs for waters impaired only by nonpoint sources. The court below said yes even though the statutory text says no. The Ninth Circuit accomplished that feat by deciding to defer to EPA's construction without first determining whether the statute itself answered the question.

In addition to flouting the statutory text and established deference law, the decision below overthrows Congress's careful allocation of responsibilities between the Federal and State governments in the fight against water pollution. Congress assigned EPA a primary role in addressing point source pollution. Recognizing that addressing nonpoint source pollution requires controls over local land uses, Congress left that task to the States, with the role of the Federal government limited to providing guidance. By authorizing EPA to establish TMDLs for waters impaired only by nonpoint sources, the Ninth Circuit has impermissibly authorized federal intrusion into a core State function. That decision will force the States to spend hundreds of millions of dollars to establish tens of thousands of TMDLs over the next decade and already is forcing private landowners to spend vast sums to adhere to EPA's unilaterally imposed mandates. Prompt intervention by this

Court is needed to prevent this waste of public and private resources and to ensure that EPA respects the limits on its regulatory powers as prescribed by Congress.

Statutory Framework. The Clean Water Act originated in the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 (1972).[1] The 1972 Act required the adoption of "effluent limitations," quantitative restrictions on pollutant discharges, for "all point sources." 33 U.S.C. §§ 1311(e), 1362(11). A "point source" is a "discernible, confined and discrete conveyance," such as a pipe. *Id.* § 1362(14). The Act provided for permits incorporating appropriate effluent limitations and authorized EPA to oversee the permit program. *Id.* §§ 1311, 1342. In Section 208 of the 1972 Act, Congress assigned the task of addressing nonpoint source pollution to the States through the development of regional waste treatment management plans. 33 U.S.C. § 1288. Section 303 addressed water quality standards, with subsections (a), (b), and (c) giving the States primary responsibility for establishing and modifying such standards. 33 U.S.C. §§ 1313(a), 1313(b), 1313(c). Section 303(d) delineates the steps to be taken for waters not compliant with those standards.

Section 303(d)(1)(A) is the primary provision at issue here. It requires the States to "identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. § 1313(d)(1)(A). The States are then to establish TMDLs for those waters. *Id.* § 1313(d)(1)(C). Upon EPA approval, the State is to incorporate those TMDLs into its "continuing planning

---

[1] Other components of the CWA include the 1977 amendments, 91 Stat. 1566, and the Water Quality Act of 1987, 101 Stat. 7. The CWA is codified at 33 U.S.C. § 1251 et seq.

process." If EPA disapproves either the State's list of identified waters or its TMDLs, it may itself identify such waters and establish appropriate TMDLs. *Id.* § 1313(d)(2), (e). For waters not on the § 303(d)(1)(A) list, States are to "estimate" TMDLs for informational purposes. *Id.* § 1313(d)(3). The States need not seek EPA approval for these estimated TMDLs. *Ibid.*

Factual Background. For two decades after the 1972 legislation was enacted, EPA did not construe § 303(d)(1) as applicable to waters impaired only by nonpoint sources. After changing its position in the early 1990s, EPA disapproved California's § 303(d)(1)(A) list of identified waters because it did not include water bodies impaired solely by nonpoint source pollution. After California refused to add those water bodies, EPA established its own section 303(d)(1)(A) list for California and subsequently established TMDLs for 16 water bodies impaired only by nonpoint source pollution.

EPA's 1998 TMDL for one of those water bodies, the Garcia River, required a 60% reduction in sediment loadings from such nonpoint sources as timber harvesting and farming and required California to implement this mandate into its water quality management and basin plans. In May 1998, an EPA official publicly told California officials that "we do expect implementation of non-point source TMDL's [in] every single timber harvest plan [and] Basin Plan" and made clear that noncompliance would be punished: "Now, what we do to get you to do that through all sorts of nasty little tricks with grants and such, I don't know, but it's not a place I want to go and I'm sure it's not a place you want to go." ER-86 ¶¶ 21-22.[2] To avoid these consequences, California began

---

[2] "E.R." refers to the Excerpts of Record filed with the appeal of this matter to the Ninth Circuit.

requiring applicants for timber harvest and management plans to conform their land uses to EPA's TMDL. *Id.* ¶ 19.

The impact on landowners was dramatic. Petitioners Guido and Betty Pronsolino had purchased 800 acres of land by the Garcia River in 1960. In 1998, after investing substantial resources to regenerate depleted forests over almost four decades, the Pronsolinos obtained a state permit to begin harvesting their timber—but subject to onerous new obligations to satisfy EPA's TMDL. Among other things, the Pronsolinos had to suspend harvesting between November and April and during rainy periods the rest of the year, retain substantial numbers of conifer trees, limit road construction, and cease using certain skid trails. The estimated cost of complying with just the conifer tree requirement was $750,000. ER-86 ¶¶ 27-35. A neighboring landowner faced additional costs of over $10 million from the new EPA mandates. *Id.* ¶¶ 45-51.

In April 1999, petitioners sued EPA and EPA officials on the ground that § 303(d)(1) does not require the States to identify and establish TMDLs for waters that are free of point source pollution. The district court granted EPA's motion for summary judgment, and the Ninth Circuit affirmed.

The Ninth Circuit first ruled that EPA's construction of § 303(d)(1) is entitled to *Chevron* deference. App., *infra*, 16a. The court did so prior to determining whether the meaning of that provision is clear and despite EPA's failure to adopt any "currently-operative" regulation embodying that construction. *Id.* at 14a. The court based its deference ruling on EPA's own interpretation of related regulations that it had adopted and on EPA's general authority to interpret the Clean Water Act. *Id.* at 12a-20a. Only then did the court turn to the statutory text. It construed § 303(d)(1)(A), which by its terms requires the States to identify only those waters for which specified effluent limitations are "not stringent enough" to achieve water quality standards, to require the

States to identify *all* waters not compliant with water quality standards. *Id.* at 21a-22a. The court also held that upholding EPA does not authorize any intrusion on State authority over land use controls because "California chose both *if* and *how* it would implement the Garcia River TMDL." *Id.* at 30a (emphasis in original).

REASONS FOR GRANTING THE PETITION

By the time the court below got to the text of § 303(d)(1), it already had deferred to EPA's construction of it. This remarkable mode of proceeding stands this Court's *Chevron* doctrine on its head. Under *Chevron*, a statute must be ambiguous before deference may be accorded to an agency's construction, and only then if the agency's construction is reasonable. *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984). There is nothing ambiguous about § 303(d)(1). It does not require the identification of all impaired waters in a State for the purpose of establishing TMDLs. To the contrary, it expressly restricts the waters to be identified to point-source impaired waters for which two specific types of effluent limitations are "not stringent enough" to achieve water quality standards. EPA and the court below removed this restriction to *some waters* from the statute and replaced it with *all waters*. By doing so, they disregarded both the plain textual meaning and this Court's decisions recognizing that Congress left regulation of nonpoint source pollution to the States.

Controlling nonpoint source pollution necessarily entails regulation of private land uses. Congress has not authorized federal regulation of such a core State and local function, much less provided the "clear statement" of such an intent that this Court's precedents require. To the contrary, Congress clearly stated its policy "to recognize, preserve, and protect the primary responsibilities and rights of States * * * to plan the development and use [of] land and water resources." 33 U.S.C. § 1251(b). Nevertheless, the decision

below grants EPA authority to impose burdensome regulatory mandates on the States to control nonpoint source pollution. The land use restrictions in EPA's TMDLs are indistinguishable in effect from the effluent limitations that Congress made applicable only to point sources. Review by this Court is required to clarify critical questions regarding the administration of—and the allocation of federal and state responsibilities under—an important federal regulatory statute.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS BARRING DEFERENCE TO AN AGENCY'S STATUTORY CONSTRUCTION WHERE THE TEXTUAL MEANING IS CLEAR.

A. The Ninth Circuit Impermissibly Determined That It Must Defer To EPA Before Analyzing The Meaning Of The Statute.

Contrary to this Court's precedents, the Ninth Circuit *began* the analysis section of its opinion, entitled "Deference to the EPA," by inquiring into "the degree of deference" owed to EPA. App., *infra*, 12a. Relying on EPA's construction of its own regulations to authorize federal imposition of TMDLs on waters impaired only by nonpoint sources, the court concluded that "EPA's interpretation is entitled to *Chevron* deference" and alternatively to *Skidmore/Mead* deference. *Id.* at 16a-17a. Only then did it turn to the text of § 303(d)(1) itself.

The Ninth Circuit got it precisely backwards. Courts must "first ask" whether the statutory meaning is clear before considering whether deference is appropriate. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); accord *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001). An independent analysis must precede the deference inquiry because courts may not even "contemplate" deference where the statute is

unambiguous on the point at issue. *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 462 (2002). Thus, "the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The decision below—that § 303(d)(1) mandates identification of *all* state waters not meeting water quality standards in order to establish TMDLs (App., *infra*, 21a-22a)—cannot be reconciled with the plain language of that statutory provision.

B. By Its Plain Terms, § 303(d)(1) Applies Only To Sub-Standard Waters Polluted By Point Sources.

Section 303(d)(1) does not require a state to identify *all* of its sub-standard waters for purposes of mandatory TMDLs. Instead, each state must identify only those waters "for which the *effluent limitations* required by section 301(b)(1)(A) and section 301(b)(1)(B) *are not stringent enough* to implement any water quality standard applicable to such waters." § 303(d)(1)(A) (emphasis added). The TMDL requirement applies only to that sub-class of a state's sub-standard waters. § 303(d)(1)(C). Because effluent limitations by definition apply only to waters that are impaired by point sources (33 U.S.C. § 1362(11)), the waters to be identified must be limited to those impaired by point sources. Waters impaired only by nonpoint sources cannot be among the waters for which effluent limitations are "not stringent enough" because they are not subject to effluent limitations at all.

By construing this provision to require the identification of *all* impaired waters within a state, the court below read the "effluent limitations * * * not stringent enough" limitation out of the statute. *Without* that limitation, each state plainly would have to identify all impaired waters within its boundaries. Yet, according to the court below, *with* that limitation each state still must identify all impaired waters within its boundaries. The Ninth Circuit's view cannot be

right because it would make the "effluent limitations * * * not stringent enough" language completely superfluous. See *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (refusing to construe statutory provision "precisely the same" as if it did not contain limiting term); *United States* v. *Alaska*, 521 U.S. 1, 59 (1997) (courts must "avoid an interpretation of a statute that renders some words altogether redundant"); *Solid Waste Agency*, 531 U.S. at 172 (rejecting argument that word "navigable" in Clean Water Act had no "independent significance").

Congress could have required the States to identify "waters," "all waters," "waters not meeting water quality standards," or "waters impaired by point and nonpoint sources" for purposes of establishing TMDLs. Instead, it designated only waters for which the effluent limitations "required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough." The effluent limitations "required by section 301(b)(1)(A) and section 301(b)(1)(B)" involve relatively modest treatment requirements applicable to all point sources, regardless of the quality of the receiving water body. But in some instances these basic technology-derived limits will not suffice. For example, the total pollution load might cause a river with a multiplicity of point sources to fall short of its applicable water quality standard, even though each individual source met its limit. In that case, the TMDL would provide a basis to calculate the "more stringent limitation * * * necessary to meet water quality standards." 33 U.S.C. § 1311(b)(1)(C). Thus, the plain language of § 303(d)(1) shows that Congress prescribed mandatory TMDLs to help clean up point source impaired waters for which existing effluent controls were not stringent enough.

The statutory text cannot plausibly be stretched to apply to waters impaired only by nonpoint sources, which are not subject to any effluent limitations. EPA's construction, accepted by the court below, departs from this plain meaning. It makes sub-standard waters for which effluent limitations

are "not stringent enough" the equivalent of all sub-standard waters, even waters with no point source pollution and thus not subject to any effluent limitation. That construction departs not only from the plain text but from plain logic. No reasonable doctor would understand a hospital rule that patients be treated with Medicine B, where Medicine A is "not stringent enough" to cure them, to require use of Medicine B for an ailment to which Medicine A was never applicable at all.

The court below thought it could avoid this problem and uphold EPA's construction by recharacterizing "not stringent enough" as not "adequate" or not "sufficient" or not "thoroughgoing enough." App., *infra*, 21a. But any such revision, even if appropriate, would be unavailing because it does not cure the defect in EPA's construction. If Congress had intended identification of *all* substandard waters, it would not have provided for identification of only *some* of those waters. See *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 122 S. Ct. 708, 712 (2002) (the term "equitable relief" in statute "must mean *something* less than *all* relief") (emphasis in original); *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 113 (2001) (statutory exemption did not apply to all employees where it specifically referenced specific class of employees). Even if not "adequate" or not "sufficient" or not "thoroughgoing enough" means the same as not "stringent enough," EPA's construction cannot cure that defect.

The court below also opined that "effluent limitations * * * not stringent enough" meant only that the 1972 Congress intended to have EPA employ TMDLs at some unspecified time in the future. App., *infra*, 23a. That hypothesis is refuted by other portions of the 1972 legislation, which required EPA to identify pollutants "suitable for" TMDL measurement by October 1973 (§ 304(a)(2)(D)) and required the States to submit initial lists of waters and TMDL calculations by April 1974

(§ 303(d)(2). And whatever Congress's intent as to the timing of TMDL deployment, that has nothing to do with *which* waters must be identified for that purpose.

The point source limitation in § 303(d)(1) stands in marked contrast to the omission from that provision of any reference to nonpoint sources. See 2A N. Singer, STATUTES AND STATUTORY CONSTRUCTION § 47.23, at 305-07 (6th ed. 2000) (statute's specification of one category creates "an inference that all omissions should be understood as exclusions"). Indeed, where Congress did intend to address nonpoint source pollution in the 1972 Act, it did so expressly.[3] "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Brown* v. *Gardner*, 513 U.S. 115, 120 (1994). The lack of any reference to nonpoint source pollution confirms the plain text meaning of § 303(d)(1)—that Congress intended only waters impaired by point sources to be subject to mandatory TMDLs.

C. The Plain Text Meaning Of § 303(d)(1) Is Confirmed By The Statutory Structure, Legislative History, and Statutory Purpose.

The structure of the Clean Water Act confirms that § 303(d)(1) is not directed to waters impaired only by

---

[3] See § 304(f), 33 U.S.C. § 1314(f) (requiring EPA to issue "guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants"); § 305(b)(1)(E), 33 U.S.C. § 1315(b)(1)(E) (requiring states to provide EPA with "a description of the nature and extent of nonpoint sources of pollutants"); § 208(b)(2)(F), 33 U.S.C. § 1288(b)(2)(F) (requiring regional waste treatment management plans to include processes to identify "agriculturally and silviculturally related nonpoint sources of pollution").

nonpoint sources. Three provisions, §§ 303(d)(3), 208, and 319, are particularly significant.

Section 303(d)(3) provides for a wholly separate and distinct TMDL process for waters not described in § 303(d)(1), including waters impaired only by nonpoint sources. It provides that states are to "estimate" TMDLs for waters not on the § 303(d)(1) list "[f]or the specific purpose of developing information." 33 U.S.C. § 1313(d)(3). These estimated, informational TMDLs, which need not be approved and may not be prescribed by EPA (§ 303(d)(2)), allow for preventative planning against the risk of point-source impairment. For example, if a manufacturer seeks to build a factory on a waterway impaired only by nonpoint source pollution, § 303(d)(3) TMDLs would provide information that would aid in establishing the scope of needed effluent limitations. The court below failed to account for this important distinction between mandatory TMDLs for waters impaired by point sources and estimated, informational TMDLs to prevent future point source impairment of waters presently impaired only by nonpoint sources, such as the Garcia River.

Congress designed § 208 of the 1972 Act to address nonpoint source pollution. That provision calls for state and local bodies to develop regional waste treatment management plans to identify and control, *inter alia*, "agriculturally and silviculturally related nonpoint sources of pollution." 33 U.S.C. § 1288(b)(2)(F). As the D.C. Circuit explained, the 1972 Congress relied on § 208 to address water pollution in "agricultural and forest areas." *NRDC* v. *Costle*, 564 F.2d 573, 578 (D.C. Cir. 1977). See also 2 F. Grad, TREATISE ON ENVIRONMENTAL LAW § 3.03[4][n], at 3-216.7 (2000) (§ 208 was an "early attempt to deal with nonpoint sources under the Federal Water Pollution Control Act"). Section 208 shows that the 1972 Congress relied on the States to address nonpoint source pollution, limiting the role of the Federal government to guidance on developing the regional

management plans. Nothing in the 1972 Act indicates that Congress intended federally imposed TMDLs to supplement § 208 management plans in addressing nonpoint source pollution.

In fact, Congress waited until 1987 to address nonpoint source pollution with measures stronger than the management plans set forth in § 208. It did so by enacting a new § 319 of the Act, entitled "Nonpoint source management programs." 33 U.S.C. § 1329. Section 319(a)(1) is the mirror image of § 303(d)(1), modifying the latter's requirements to make them applicable in the nonpoint source context. Whereas § 303(d)(1)(A) requires identification of waters for which the specified controls over point source pollution are not stringent enough to achieve water quality standards, § 319(a)(1)(A) requires identification of waters for which "additional action to control nonpoint sources of pollution" is needed. Whereas § 303(d)(1)(C) requires establishment of TMDLs for particular pollutants that prevent the identified waters from achieving water quality standards, § 319(a)(1)(C) requires identification of "best management practices and measures" to control "nonpoint sources" and reduce the levels of particular pollutants "to the maximum extent practicable."

If § 303(d)(1) already covered nonpoint source pollution, the 1987 Congress would have had no need to add these parallel provisions in § 319(a)(1). See *Kawaauhau* v. *Geiger*, 523 U.S. 57, 62 (1998) (rejecting "interpretation of a congressional enactment which renders superfluous another portion of that same law"); *Stone* v. *INS*, 514 U.S. 386, 397 (1995) (Congress would have had "no reason" to enact amendment if it simply reprised "already existing" provision). EPA and the court below sought to overcome this obstacle to their desired result by urging that Congress merely supplemented § 303(d)(1) TMDLs with overlapping § 319(a)(1) best management practices to address nonpoint source pollution. See App., *infra*, 27a. But just as two

parallel lines never overlap, the parallelism between §§ 303(d)(1) and 319(a)(1) indicates that they were directed to two distinct purposes. The 1987 Congress saw the need for the States to take stronger measures to address nonpoint source pollution than did the 1972 Congress. Without ever indicating that it considered § 303(d)(1) TMDLs to be an available tool for that purpose, it enacted a comparable provision directed to nonpoint source pollution, utilizing best management practices and similar state and local programs. Even if the court below could validly ignore the plain text of § 303(d)(1) as written by the 1972 Congress, there was no valid reason for it to show more deference to EPA's current construction of that provision than to the construction of the 1987 Congress.

The plain text meaning of § 303(d)(1)—that Congress intended TMDLs to apply only to waters impaired by point sources and to pave the way for more stringent effluent controls—is confirmed by unambiguous legislative history. As the House Report explained, "*point sources* could be required to meet a more stringent effluent limitation consistent with water quality standards of the receiving waters if the effluent limitations set pursuant to subsection (b)(1)(A) and subsection (b)(1)(B) of section 301 are inadequate to meet those water quality standards. In this case a more stringent *effluent limitation* will be imposed." H.R. Rep. No. 92-911 (1972), reprinted in 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 753, 792 (1973) (emphasis added). See also *id.* at 788-789 ("if the sum of the discharges from *point sources* meeting such effluent limitations would preclude the meeting of water quality standards," TMDLs would require establishment of "more stringent *effluent limitations*") (emphasis added). Nowhere in the extensive Congressional reports and debates is there any suggestion that TMDLs were to be directed to nonpoint source pollution.

The reliance of the court below on the "broad goals" of the 1972 Act cannot overcome its plain text. See *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 261 (1993) ("statute's 'basic purpose'" is "inadequate to overcome the words of its text"); *Board of Gov. of Fed. Res. Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-374 (1986) (same). In any event, the primary goal of the 1972 Act was to eliminate or reduce point source pollution. Section 101(a) set forth six national policy goals, none directed to waters impaired only by nonpoint sources beyond the regional waste treatment provisions in § 208. It was not until § 319 was added in 1987—15 years after the TMDL provisions were enacted—that Congress established a "national policy that programs for the control of nonpoint sources of pollution be developed and implemented." 33 U.S.C. § 1251(a)(7). And even then, nonpoint sources were "not subject to any comprehensive regulatory structure, at least at the federal level." 2 Grad, *supra*, TREATISE ON ENVIRONMENTAL LAW § 3.03[4][n], at 3-216.

Congress's restriction of mandatory TMDLs to waters impaired by point source pollution not only was consistent with the purpose of the 1972 Act but sensible in light of the nature of TMDLs. Requiring precise, quantitative load allocations makes sense for point source pollution. Discharges from the end of a pipe can be controlled by technology, easily sampled and measured to determine compliance, and limited by the permit process. But that approach makes no sense at all in the context of nonpoint source pollution. The Garcia River TMDL, for example, focuses on sediment, most of which results from runoff after rainfall. ER 86 ¶ 12. Neither rainfall nor runoff occurs with the predictability and precision appropriate for quantitative TMDL controls. That is why the Clean Water Act provisions directed to nonpoint source pollution employ estimates and qualitative management programs to address that problem, and these only "to the extent feasible," and "to the maximum extent practicable." 33 U.S.C. §§ 1288, 1329. Using

mandatory TMDLs, new tools developed as part of the 1972 Act's focused effort to eradicate point source pollution, would be inconsistent with these feasibility and practicability constraints on the reduction of nonpoint source pollution.

In sum, if Congress had wanted to impose TMDLs on waters impaired only by nonpoint sources, it would have "legislate[d] to make that intention manifest." *EPA* v. *California*, 426 U.S. 200, 228 (1976). It did not do so in the 1972 Act and has not done so since, and neither EPA nor the Ninth Circuit may legislate in its stead. See *American Iron & Steel Inst.* v. *EPA*, 115 F.3d 979, 996 (D.C. Cir. 1997) (EPA "exceeded its authority when it sought to impose effluent limitations upon nonpoint-source discharges"). The eagerness of the court below to ratify EPA's expansion of § 303(d)(1) TMDLs to waters impaired only by nonpoint sources, which led it to determine the "degree of deference" owed to EPA before determining the meaning of the statutory text, manifested an open disdain for this Court's precedents.

D. EPA's Construction Of § 303(d)(1) Is Unreasonable.

Even if the meaning of § 303(d)(1) were ambiguous, the unreasonableness of EPA's construction precludes it from obtaining deference. See *Commissioner* v. *Engle*, 464 U.S. 206, 226 (1984) ("unreasonable" agency construction is "not entitled to deference"). The unreasonableness of reading § 303(d)(1)(A) as if it did not contain an express restriction on the waters to be identified is underscored by the fact that EPA did not articulate its current position until some two decades after § 303(d)(1) was enacted.

An agency's failure to enforce a provision for so long "strongly suggests that it did not read the statute as granting such power." *BankAmerica Corp.* v. *United States*, 462 U.S. 122, 131 (1983); accord *FPC* v. *Panhandle E. Pipe Line Co.*, 337 U.S. 498, 513 (1949). For more than 20 years after passage of the 1972 Act, EPA dealt with nonpoint source

pollution not through TMDLs but through advisory management planning under § 208 and, once the Act was amended in 1987, through nonpoint source identification and planning under § 319. Under interest group pressure to do more, EPA changed course in the 1990s and, without seeking Congressional approval, for the first time asserted its authority to impose TMDLs on the States as a means to address waters impaired only by nonpoint sources.

Following enactment of the 1972 Act, EPA viewed § 208 as the sole provision designed to control nonpoint source pollution. As the D.C. Circuit noted, "[i]n EPA's view, the Act divides the causes and control of water pollution into two categories, point sources of pollutants (regulated through the § 402 permit program) and nonpoint sources of pollution (regulated by the states through 'areawide waste treatment management plans' under § 208)." *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 165-166 (D.C. Cir. 1982). EPA maintained that position when it first adopted TMDL regulations in 1985. Those regulations did not refer to waters impaired only by nonpoint sources, and EPA's preface stated that "those waters not covered by this interpretation" are subject only to the informational and estimated TMDLs under section 303(d)(3). 50 Fed. Reg. 1774, 1775 (1985). As late as 1987, 15 years after § 303(d) was enacted, EPA issued a comprehensive guide to the States' role in addressing nonpoint source pollution which *did not even mention* TMDLs or § 303(d). EPA, *Nonpoint Source Guidance (1987)*, in CLEAN WATER DESKBOOK 173, 177 (1991).

EPA changed course in 1992, circulating an internal memorandum stating that the § 303(d)(1) TMDL process applied to waters impaired only by nonpoint sources. ER-91 Ex. 17, at 2. This change in position, which was never the subject of rulemaking or public comment, provided the backdrop for EPA's rejection of California's § 303(d)(1) list in 1992 and initiated the events leading to this litigation. See *United States* v. *Mead Corp.*, 533 U.S. 218, 231 (2001) (lack

of notice-and-comment weighs against deference to agency determination); *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000). EPA understood that its new position represented a significant departure from its prior construction. As it admitted in a 1997 memorandum, it had not previously provided guidance on "implementation of TMDLs for waters impaired only by nonpoint sources." ER-91 Ex. 7, at 5.

This history establishes that for two decades the agency charged with enforcing the Clean Water Act construed § 303(d)(1), in accordance with its plain meaning, as inapplicable to waters impaired only by nonpoint sources. Succumbing to outside pressure, EPA later bypassed Congress and unilaterally expanded the scope of § 303(d)(1). There is no reason to defer to EPA's redrafting of the statute to fit its current policy predilections. See *Solid Waste Agency*, 531 U.S. at 168 (rejecting agency's current position as inconsistent with its "original interpretation of the CWA"); *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396 (1956) (agency's "more recent ad hoc contention as to how the statute should be construed cannot stand" against "prior long-standing and consistent administrative interpretation").

EPA's policy shift was particularly unreasonable because it authorized federal encroachment upon a traditional state power, control over local land uses. See *infra*, Part II.B. An agency assertion that Congress intended such encroachment without a "clear indication" of such intent is unreasonable and not entitled to deference. *Solid Waste Agency*, 531 U.S. at 172-173.[4]

---

[4] EPA's reading of § 303(d)(1) has been controversial even within federal administrative circles. In 1996, EPA formed an advisory committee on TMDL issues pursuant to the Federal Advisory Committee Act. After two years of meetings, the Committee could not reach agreement on "whether waters impacted only by nonpoint sources are to be listed under § 303(d)(1)(A), § 303(d)(3), or only under § 319" and thus it

II. THE NINTH CIRCUIT CONSTRUED AN IMPORTANT FEDERAL REGULATORY STATUTE IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

A. The 1972 Congress Was Focused On Reducing Point Source Pollution.

The decision below departs from this Court's decisions recognizing that the primary aim of the 1972 Act was to initiate Federal programs to reduce point source pollution, with reduction of nonpoint source pollution left to the States.

The 1972 Act has been universally understood to embody that allocation. See *Appalachian Power Co.* v. *Train*, 545 F.2d 1351, 1373 & n.68 (4th Cir. 1976) ("Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the Act to regulate only the former," with nonpoint sources subject "only to analysis, study, and suggestions"). As this Court has explained, the novel aspects of the 1972 Act focused on point source pollution. The Act introduced "two major changes" in the effort to abate and control water pollution—the imposition of "maximum 'effluent limitations' on 'point sources'" and the establishment of a permit system to achieve and enforce the "effluent limitations." *EPA* v. *California*, 426 U.S. 200, 204-205 (1976). Those changes, both involving "effluent limitations," were addressed only to point source

---

"decided not to address these legal issues in its report." EPA, *Report of the Federal Advisory Committee on the Total Maximum Daily Load (TMDL) Program* 42 (July 1998). Another directly concerned federal agency, the U.S. Forest Service, objected to the application of § 303(d)(1) to nonpoint-source-impaired waters, stating that the provision "was written with point sources in mind" and that Congress passed § 319 "specifically to address nonpoint sources of pollution." See April 29, 1997 letter from Forest Service to EPA, quoted in Houck, THE CLEAN WATER ACT TMDL PROGRAM 61-62 (1999).

pollution. TMDLs, a newly designed tool to achieve water quality standards, were part of those changes and the fight against point source pollution. Congress intended water quality standards to serve as "a supplementary basis for effluent limitations * * * so that numerous *point sources*, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *Id.* at 205 n.12 (emphasis added).

Consistent with that understanding, Congress designed TMDLs to enable the States and EPA to determine what further controls would be necessary to control point source pollution. Options included adopting more stringent effluent limitations to achieve water quality standards (see 33 U.S.C. § 1311(b)(1)(c)), limiting the activities of authorized point source polluters (see *PUD No. 1* v. *Washington Dep't of Ecology*, 511 U.S. 700, 712-713 (1994)), or denying or modifying point source permits (see 40 C.F.R. § 122.62 (a)). See *Environmental Defense Fund, Inc.* v. *Costle*, 657 F.2d 275, 294 (D.C. Cir. 1981) (TMDLs are "allocated by insertion into NPDES permits, among the various point source dischargers upon the stream segment").

Congress did not direct TMDLs to nonpoint source pollution, such as agricultural run-off, because by its very nature it is not subject to effluent controls, no matter how stringent. Moreover, at the time of enactment, Congress "had comparatively scant information concerning the origins of nonpoint source pollutants, their relative contribution to the overall water pollution problem, and the feasibility of controls. Additionally, there was a strong feeling that nonpoint source pollution is too highly dependent on local topographic, soil, and vegetative conditions to be successfully regulated through national limitations applicable to point source pollutants." J. Montgomery, *Control of Agricultural Water Pollution: A Continuing Regulatory*

Dilemma, 1976 U. Ill. L.F. 533, 539-540.[5] The 1972 Congress therefore focused the new legislation on effluent controls, permits, TMDLs, and other measures to address point source pollution. EPA's requirement that TMDLs be prepared for waters impaired only by nonpoint sources conflicts with this Court's recognition that Congress intended overall water quality standards to play but a "supplementary" role in the 1972 Act scheme.

B. Congress Allocated Responsibility Over Non-point Source Pollution To The States.

Congress's focus on the Federal government's role in reducing point source pollution was consistent with its understanding that the States would continue to bear responsibility for reducing nonpoint source pollution. As this Court has explained, "the Clean Water Act establishes distinct roles for the Federal and State Governments." *PUD No. 1*, 511 U.S. at 704. On the one hand, the Federal government regulates "technology-based limitations on individual discharges into the country's navigable waters from point sources." *Ibid.* On the other hand, the "States are responsible for enforcing water quality standards" on intrastate waters, which necessarily implicate nonpoint source pollution. *Id.* at 707.

That division of responsibility comports with historical practice and the differences between point source and

---

[5] Montgomery's exhaustive article does not mention § 303(d) or the use of TMDLs as an option for controlling nonpoint source pollution. That omission is consistent with other authorities addressing nonpoint source pollution under the 1972 Act. See G. Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law*, 23 U.C. Davis L. Rev. 461 (1990); D. Zaring, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 Harv. Envtl. L. Rev. 515 (1996).

nonpoint source pollution. The diffuse nature of nonpoint source pollution, such as runoff from farms, forests, and parking lots, requires that it be addressed through controls over private land use practices. See 117 Cong. Rec. 38825 (1971) (the only "effective way" to intercept and control runoff is through "land use control") (Sen. Muskie). As this Court long has recognized, land use regulation "is perhaps the quintessential state activity" (*FERC* v. *Mississippi*, 456 U.S. 742, 768 n.30 (1982)) and has been "traditionally performed" by state and local governments. *Hess* v. *Port Auth.*, 513 U.S. 30, 44 (1994). In fact, "the overwhelming majority of land-use management" is performed by local state subdivisions "through local government regulation." Zygmunt Plater et al., ENVIRONMENTAL LAW AND POLICY 1164 (2d ed. 1998); see also John Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 Harv. Envtl. L. Rev. 365, 386-410 (2002) (discussing broad array of land-use controls applied by local governments for environmental purposes).

Federal control of nonpoint source pollution necessarily impinges on the traditional core State function of controlling land uses. It "inevitably will require the development of controversial and entirely new land-use management techniques." R. Lazarus, *Nonpoint Source Pollution*, 2 Harv. Envtl. L. Rev. 176, 183 (1977). For example, as a result of the Garcia River TMDL's requirement that sediment loadings be reduced by 60%, petitioners Guido and Betty Pronsolino were forced, *inter alia*, to forgo harvesting on rainy days between May and October, harvesting many large conifer trees altogether, and using their own skid trails. ER-86 ¶¶ 11-12, 14-15, 32. Experts predict that the decision below will make EPA a "de facto land planning agency [that] can override all state decisions regarding natural resources industries or agriculture." Henry Stephens & Monica Dias, *TMDLs for Nonpoint Sources in Kentucky: The Potential Impact of* Pronsolino v. Marcus, 16 J. Nat. Resources &

Envt'l L. 1, 29 (2002). The Ninth Circuit nonetheless acquiesced in EPA's assertion that it may impose such onerous land use obligations on the States and private landowners.

The decision below cannot be reconciled with this Court's repeated admonitions in Clean Water Act cases that such a "heavy regulatory burden on the States" should not be attributed to Congress without solid "textual support" and, indeed, a "clear statement" from Congress. *PUD No. 1*, 511 U.S. at 718; *Solid Waste Agency*, 531 U.S. at 174. As demonstrated in Part I above, Congress provided no "clear statement" or any textual support at all for the imposition of § 303(d)(1) TMDLs, with their burdensome land use mandates, on the States. Rather, as this Court recently put it, "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to plan the development and use of land and water resources.'" *Solid Waste Agency*, 531 U.S. at 174, quoting 33 U.S.C. § 1251(b). Thus, an agency's interpretation of the Clean Water Act that results in a "significant impingement of the States' traditional and primary power over land and water use" cannot stand. *Ibid.* Instead, courts must "read the statute as written" to avoid such a result. *Ibid.*[6]

The district court recognized the "practical reality" that implementing TMDLs for waters impaired only by nonpoint sources could force the States to "knuckle under to coercive threats by EPA," but it opined that "this is not direct federal

---

[6] The fact that § 303(d)(1)(A) does not employ the terms "point sources and nonpoint sources as such" (App., *infra*, 24a) does not overcome the need for a "clear statement" from Congress. Not only do the provision's references to "effluent limitations" apply only to point sources, as demonstrated above, but "[m]ere silence" is insufficient "to establish a clear and manifest purpose to pre-empt local authority." *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. 2226, 2232 (2002).

regulation." App., *infra*, 69a. The court of appeals agreed, calling TMDLs mere "informational tools that *allow* the states" to achieve water quality standards. App., *infra*, 9a (emphasis added); see also *id.* at 30a. The lower courts' dismissal of the coercive impact of mandatory TMDLs rings hollow in light of EPA's strong-arm behavior, as reflected in the record of this case. EPA's Garcia River TMDL assigned and allocated numeric maximum loads with respect to specific land uses. EPA *required* California to list all sub-standard waters impaired only by nonpoint source pollution, *imposed* a TMDL on the Garcia River that expressly *required* California to incorporate specific sediment loadings into its State Water Quality Management Plan, and *required* California to implement EPA's TMDL through additional restrictions on timber harvesting. See ER-91 Ex. 1, at 6-7, 58. EPA's misreading of § 303(d)(1) has thrust it squarely into the local land use arena, effectively forcing states to adopt EPA-directed land use measures. Even if EPA officials do not actually stand on the affected land and supervise its use, threatening state officials with "all sorts of nasty little tricks" achieves the same result. See ER-86 ¶ 21.

Indeed, EPA's construction of § 303(d)(1) authorizes so substantial an intrusion into this area of traditional state concern as to raise severe constitutional questions. See *Jones* v. *United States*, 529 U.S. 848, 858 (2000) (narrowly construing federal statute to avoid infringing on a "traditional state concern"); *Solid Waste Agency*, 531 U.S. at 173 (same). The Constitution does not permit the federal government to "regulate state governments' regulation" of local land uses, as EPA seeks to do. *New York* v. *United States*, 505 U.S. 144, 166 (1992). Construing § 303(d)(1) not to mandate TMDLs for waters impaired only by nonpoint sources would avoid both upsetting the federalist balance prescribed by Congress in the Clean Water Act and crossing the constitutional line.

III. WHETHER CONGRESS AUTHORIZED EPA TO REGULATE WATERS IMPAIRED ONLY BY NONPOINT SOURCES IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE PROMPTLY SETTLED BY THIS COURT.

Although no other court of appeals has ruled on the precise question at issue—whether § 303(d)(1) requires the identification and establishment of TMDLs for waters impaired only by nonpoint sources—there are compelling reasons why this Court should promptly decide this important question of federal law.[7]

Regardless of any inter-circuit conflict, this Court has granted certiorari in light of a "clear misreading by the lower courts of the applicable and important federal statute" (*Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 5 (1991)); to consider "an unresolved question under an important federal statute" (*Reliance Elec. Co.* v. *Emerson Elec. Co.*, 404 U.S. 418, 421-422 (1972)); to review "questions of importance in the administration of" an important federal regulatory statute (*United States* v. *Ruzicka*, 329 U.S. 287, 288 (1946)); because of "the importance of the issue for the agricultural community" (*National Broiler Marketing Ass'n* v. *United States*, 436 U.S. 816, 820 (1978)); because of "the importance of the question presented to the States and affected individuals" (*Olmstead* v. *Zimring*, 527 U.S. 581, 596 (1999)); and to review whether an agency exceeded its

---

[7] A recent ruling by a state trial court directly conflicts with the decision below. In *Hawes* v. *Oregon*, No. 00-198, slip. op. 8 (Or. Cir. Ct., Baker County, Dec. 9, 2002), the court ruled that "the intent of Congress was to require the implementation of TMDLs on point sources of pollution but not on nonpoint sources." It therefore held that Oregon acted beyond its authority in executing an agreement with EPA "concerning the implementation of TMDLs for nonpoint sources of pollution." Twelve copies of that ruling have been lodged with the Clerk.

authority by imposing regulatory mandates in conflict with the governing statute. *Public Lands Council* v. *Babbitt*, 529 U.S. 728, 739 (2000); *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). The decision below warrants this Court's review under each of these criteria. And this Court has many times recognized the importance of resolving unsettled questions about the construction and application of the Clean Water Act.[8]

An early and definitive ruling by the Court is especially warranted in this case because the decision below has confused the established statutory line between Federal and State regulation of water pollution. Many of the affected waters flow through more than one State. Only this Court can establish a clear national rule as to whether EPA may mandate § 303(d)(1) TMDLs for waters impaired solely by nonpoint sources. A uniform understanding of the Clean Water Act's allocation of federal-state responsibilities is critical to delineating permissible uses of land and water in all 50 States.

---

[8] *E.g.*, *Borden Ranch P'ship* v. *United States Army Corps of Eng'rs*, 123 S. Ct. 599 (2002); *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167 (2000); *PUD No. 1* v. *Washington Dep't of Ecology*, 511 U.S. 700 (1994); *Arkansas* v. *Oklahoma EPA*, 503 U.S. 91 (1992); *Gwaltney, Ltd.* v. *Chesapeake Bay Found.*, 484 U.S. 49 (1987); *International Paper Co.* v. *Ouelette*, 479 U.S. 481 (1987); *Chemical Mfrs. Ass'n* v. *NRDC*, 470 U.S. 116 (1985); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981); *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977); *EPA* v. *California*, 426 U.S. 200 (1976); *Train* v. *Colorado Public Interest Group*, 426 U.S. 1 (1976); *Train* v. *Campaign Clean Water, Inc.*, 420 U.S. 136 (1975).

This is no small matter. EPA's position, as sustained below, will require at least 40,000 TMDLs over the next decade.[9] Developing these TMDLs will cost the States over $1 billion, most of which will come from public funds.[10] Roughly half of these TMDLs will be directed to waters impaired only by nonpoint sources.[11] As the National Governors Association wrote to President Clinton on July 6, 2000, the "states simply do not have the enormous resources necessary to accomplish such a task."[12] Complying with these comprehensive, novel, and federally imposed land use mandates also will impose incalculable costs on private landowners. As the record in this case shows, the Garcia River TMDL alone imposed over $10 million in costs on just one landowner. See App., *infra*, 11a. And as petitioners Guido and Betty Pronsolino discovered, such TMDLs force landowners to make deep and costly cutbacks in land use activities to compensate for background sediment loadings over which they often have no control. A dispositive ruling

---

[9] See EPA, Notice of Request for Comments on State, Regulated Community, and Small Business Cost Resulting from the TMDL Program, 65 Fed. Reg. 75699, 75700 (2000).

[10] See EPA, *Fact Sheet on "The National Costs of the Total Maximum Daily Load Program (Draft Report),"* http://www.epa.gov/owow/tmdl/coststudy/costfact.html.

[11] See EPA, *Federal Appeals Court Upholds Landmark Clean Water Decision*, Region 9 News Release (June 3, 2002), http://www.epa.gov/owow/tmdl/lawsuit.html ("54 percent of California's impaired waterways are polluted by non-point sources exclusively"); EPA, *Overview of the Total Maximum Daily Load Program*, http://www.epa.gov/owow/tmdl/tptmdl (43% of waters nationwide on 1998 § 303(d)(1) lists are impaired solely by nonpoint sources).

[12] Available at http://www.nga.org/nga/legislativeUpdate/1,1169, C_LETTER%5ED_1077,00.html.

by this Court is needed to prevent such an enormous and needless waste of resources.

Recent events underscore the urgent need for review of the decision below. In 1999, EPA proposed a new rule to formalize its position that § 303(d)(1) applies to waters impaired only by nonpoint sources. In doing so, EPA effectively recognized that its longstanding TMDL regulations, enacted in 1985, are out of step with its current position. See Proposed Revisions to the Water Quality Planning and Management Regulation, 64 Fed. Reg. 46012 (Aug. 23, 1999). EPA was widely criticized for seeking to effect this change without seeking Congressional authorization. See Susan Bruninga, *House Panel Members Question EPA Authority to Issue TMDL Proposal*, 30 Env't Rep. (BNA) 1241, 1242 (Nov. 5, 1999). Responding to this criticism, Congress passed H.R. 4425 in June 2000 to block funding for implementation of EPA's proposed rule. EPA sought to avoid that legislation by publishing its rule in the Federal Register just hours before President Clinton signed H.R. 4425 into law (as P.L. 106-246). In the face of litigation challenging the validity of the new rule, EPA first delayed its effective date and then withdrew it. See Withdrawal of Revisions to the Water Quality Planning and Management Regulation, 67 Fed. Reg. 79020 (Dec. 27, 2002).

That withdrawal does not reflect any pullback from EPA's application of § 303(d)(1) to waters impaired only by nonpoint sources. See 67 Fed. Reg. at 79026 ("EPA anticipates no reduction in the pace of TMDLs being developed"). Rather, EPA now intends to rely on the decision below to implement its TMDL program—and thereby bypass Congress and the litigation that its aggressive new rule had provoked. This recent history confirms EPA's refusal to abide by the statutory text and underscores the vital need for this Court's intervention. Only Congress, not EPA or the Ninth Circuit, may amend the Clean Water Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

TIMOTHY S. BISHOP
SUSAN E. BRICE
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

JOHN J. RADEMACHER
American Farm Bureau Federation
225 Touhy Avenue
Park Ridge, IL 60068
(847) 685-8600

JEFFREY W. SARLES
Counsel of Record
RUSSELL R. EGGERT
CRISTINA CARMODY TILLEY
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

NANCY N. MCDONOUGH
California Farm Bureau Federation
2300 River Plaza Drive
Sacramento, CA 95833
(916) 561-5500

FEBRUARY 2003

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 00-16026, 00-16027.

Guido A. Pronsolino; Betty J. Pronsolino, as Trustees for the Guido A. Pronsolino and Betty J. Pronsolino Trust; The Mendocino County Farm Bureau; The California Farm Bureau Federation; The American Farm Bureau Federation,

Plaintiffs-Appellants,

v.

Wayne Nastri, Regional Administrator, United States Environmental Protection Agency Region 9; Christie Whitman, Administrator, United States Environmental Protection Agency; United States Environmental Protection Agency,

Defendants-Appellees,

Pacific Coast Federation of Fishermen's Associations, a California Non-Profit corporation; San Francisco Baykeeper, a California Public Benefit corporation; Association of Metropolitan Sewerage Agencies,

Defendants-Intervenors-Appellees.

Guido A. Pronsolino,

Plaintiff,

v.

Wayne Nastri,* Regional Administrator, United States Environmental Protection Agency Region 9; Christie Whitman,** Administrator, United States Environmental Protection Agency; United States Environmental Protection Agency,

Defendants-Appellees,

Pacific Coast Federation of Fishermen's Associations, a California Non-Profit corporation; San Francisco Baykeeper, a California Public Benefit corporation,

Defendants-Intervenors-Appellees,

v.

American Forest & Paper Association; California Forestry Association,

Plaintiff-Intervenors-Appellants.

Appeal from the United States District Court for the Northern District of California; William H. Alsup, District Judge, Presiding. D.C. No. CV-99-01828-WHA.

Argued and Submitted July 9, 2001.
Filed May 31, 2002.

Before: HALL, WARDLAW and BERZON, Circuit Judges.

---

* Wayne Nastri is substituted for his predecessor, as Regional Administrator, U.S. Environmental Protection Agency Region 9. Fed.R.App. P. 43(c)(2).

** Christie Whitman is substituted for her predecessor as Administrator, U.S. Environmental Protection Agency. Fed.R.App. P. 43(c)(2).

OPINION

BERZON, Circuit Judge.

The United States Environmental Protection Agency ("EPA") required California to identify the Garcia River as a water body with insufficient pollution controls and, as required for waters so identified, to set so-called "total maximum daily loads" ("TMDLs")—the significance of which we explain later—for pollution entering the river. Appellants challenge the EPA's authority under the Clean Water Act ("CWA" or the "Act") § 303(d), 33 U.S.C. § 1313(d), to apply the pertinent identification and TMDL requirements to the Garcia River. The district court rejected this challenge, and we do as well.

CWA § 303(d) requires the states to identify and compile a list of waters for which certain "effluent limitations" "are not stringent enough" to implement the applicable water quality standards for such waters. § 303(d)(1)(A). Effluent limitations pertain only to point sources of pollution; point sources of pollution are those from a discrete conveyance, such as a pipe or tunnel. Nonpoint sources of pollution are non-discrete sources; sediment run-off from timber harvesting, for example, derives from a nonpoint source. The Garcia River is polluted only by nonpoint sources. Therefore, neither the effluent limitations referenced in § 303(d) nor any other effluent limitations apply to the pollutants entering the Garcia River.

The precise statutory question before us is whether the phrase "are not stringent enough" triggers the identification requirement both for waters as to which effluent limitations apply but do not suffice to attain water quality standards and for waters as to which effluent limitations do not apply at all to the pollution sources impairing the water. We answer this question in the affirmative, a conclusion which triggers the application of the statutory TMDL requirement to waters such as the Garcia River.

I. STATUTORY BACKGROUND

Resolution of the statutory interpretation question before us, discrete though it is, "requires a familiarity with the history, the structure, and, alas, the jargon of the federal water pollution laws." *Natural Res. Def. Council* v. *EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990). We therefore begin with a brief overview of the Act.

A. The Major Goals and Concepts of the CWA

Congress enacted the CWA in 1972, amending earlier federal water pollution laws that had proven ineffective. *EPA* v. *California*, 426 U.S. 200, 202 (1976). Prior to 1972, federal water pollution laws relied on "water quality standards specifying the acceptable levels of pollution in a State's interstate navigable waters as the primary mechanism...for the control of water pollution." *Id.* The pre-1972 laws did not, however, provide concrete direction concerning how those standards were to be met in the foreseeable future.

In enacting sweeping revisions to the nation's water pollution laws in 1972, Congress began from the premise that the focus "on the tolerable effects rather than the preventable causes of pollution" constituted a major shortcoming in the pre-1972 laws. *Oregon Natural Desert Assoc.* v. *Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998) (quoting *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 202-03 (1976)). The 1972 Act therefore sought to target primarily "the preventable causes of pollution," by emphasizing the use of technological controls. *Id.*; *Oregon Natural Res. Council* v. *United States Forest Serv.*, 834 F.2d 842, 849 (9th Cir. 1987).

At the same time, Congress decidedly did *not* in 1972 give up on the broader goal of attaining acceptable water quality. CWA § 101(a), 33 U.S.C. § 1251(a). Rather, the new statute recognized that even with the application of the mandated technological controls on point source discharges, water bodies

still might not meet state-set water quality standards, *Natural Res. Def. Council*, 915 F.2d at 1316-17. The 1972 statute therefore put in place mechanisms other than direct federal regulation of point sources, designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 101(a).

In so doing, the CWA uses distinctly different methods to control pollution released from point sources and that traceable to nonpoint sources. *Oregon Natural Res. Council*, 834 F.2d at 849. The Act directly mandates technological controls to limit the pollution point sources may discharge into a body of water. *Dombeck*, 172 F.3d at 1096. On the other hand, the Act "provides no direct mechanism to control nonpoint source pollution but rather uses the 'threat and promise' of federal grants to the states to accomplish this task," *id.* at 1097 (citations omitted), thereby "recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources . . . ." § 101(b).

B. The Structure of CWA § 303, 33 U.S.C. § 1313

1. *Water Quality Standards*

Section 303 is central to the Act's carrot-and-stick approach to attaining acceptable water quality without direct federal regulation of nonpoint sources of pollution. Entitled "Water Quality Standards and Implementation Plans," the provision begins by spelling out the statutory requirements for water quality standards: "Water quality standards" specify a water body's "designated uses" and "water quality criteria," taking into account the water's "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes . . . ." § 303(c)(2). The states are required to set water quality

standards for *all* waters within their boundaries regardless of the sources of the pollution entering the waters. If a state does not set water quality standards, or if the EPA determines that the state's standards do not meet the requirements of the Act, the EPA promulgates standards for the state. §§ 303(b), (c)(3)-(4).

2. *Section 303(d): "Identification of Areas with Insufficient Controls; Maximum Daily Load"*[1]

Section 303(d)(1)(A) requires each state to identify as "areas with insufficient controls" "those waters within its boundaries for which the effluent limitations required by section [301(b)(1)(A)] and section [301(b)(1)(B)] of this title are not stringent enough to implement any water quality standard applicable to such waters." *Id.* The CWA defines "effluent limitations" as restrictions on pollutants "discharged from point sources." CWA § 502(11), 33 U.S.C. § 1362(11). Section 301(b)(1)(A) mandates application of the "best practicable control technology" effluent limitations for most point source discharges, while § 301(b)(1)(B) mandates application of

---

[1] The complete text of sections 303(d)(1)(A) and (C) reads:

(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

§§ 303(d)(1)(A), (C).

effluent limitations adopted specifically for secondary treatment at publicly owned treatment works. § 301(b)(1), 33 U.S.C. § 1311(b)(1).

For waters identified pursuant to § 303(d)(1)(A) (the "§ 303(d)(1) list"), the states must establish the "total maximum daily load" ("TMDL") for pollutants identified by the EPA as suitable for TMDL calculation.[2] § 303(d)(1)(C). "A TMDL defines the specified maximum amount of a pollutant which can be discharged or 'loaded' into the waters at issue from all combined sources." *Dioxin/Organochlorine Center* v. *Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995).[3] The TMDL "shall be established at a level necessary to implement the applicable water quality standards . . . ." § 303(d)(1)(C).

Section 303(d)(2), in turn, requires each state to submit its § 303(d)(1) list and TMDLs to the EPA for its approval or disapproval. If the EPA approves the list and TMDLs, the state must incorporate the list and TMDLs into its "continuing planning process," the requirements for which are set forth in § 303(e). § 303(d)(2). If the EPA disapproves either the § 303(d)(1) list or any TMDLs, the EPA must itself put together the missing document or documents. *Id.* The state then incorporates any EPA-set list or TMDL into the state's continuing planning process. *Id.*

Each state must also identify all waters *not* placed on its § 303(d)(1) list (the "§ 303(d)(3) list") and "estimate" TMDLs for pollutants in those waters. § 303(d)(3). There is no

---

[2] The EPA has identified all pollutants, under proper technical conditions, as suitable for TMDL calculation. 43 Fed. Reg. 60662 (Dec. 28, 1978).

[3] The CWA does not define the term "total maximum daily load." The term "discharge" refers only to pollution emanating from point sources. *Dombeck*, 172 F.3d at 1097. The term "loading" refers to the addition of pollution into a body of water from either point or nonpoint sources. 40 C.F.R. § 130.2(e) (2000).

requirement that the EPA approve the § 303(d)(3) lists or the TMDLs estimated for those waters. *Id.*

The EPA in regulations has made more concrete the statutory requirements. Those regulations, in summary, define "water quality limited segment[s]"—those waters that must be included on the § 303(d)(1) list—as "[a]ny segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306[, 33 U.S.C. § 1316]." 40 C.F.R. § 130.2(j) (2000). The regulations then divide TMDLs into two types: "load allocations," for nonpoint source pollution, and "wasteload allocations," for point source pollution. § 130.2(g)-(i); *see also* p. 7919, *infra*. Under the regulations, states must identify those waters on the § 303(d)(1) lists as "still requiring TMDLs" if any required effluent limitation or other pollution control requirement (including those for nonpoint source pollution) will not bring the water into compliance with water quality standards. § 130.7(b) (2000).[4]

3. *Continuing Planning Process*

The final pertinent section of § 303, § 303(e), requiring each state to have a "continuing planning process," gives some operational force to the prior information-gathering provisions. The EPA may approve a state's continuing planning process only if it "will result in plans for all navigable waters within such State" that include, inter alia, effluent limitations, TMDLs, areawide waste management plans for nonpoint sources of pollution, and plans for "adequate implementation, including schedules of compliance, for revised or new water quality standards." § 303(e)(3).

---

[4] We review the regulations in greater detail below.

The upshot of this intricate scheme is that the CWA leaves to the states the responsibility of developing plans to achieve water quality standards if the statutorily-mandated point source controls will not alone suffice, while providing federal funding to aid in the implementation of the state plans. *See Dombeck*, 172 F.3d at 1097; § 303(e); *see also* § 319(h), 33 U.S.C. § 1329(h) (providing for grants to states to combat nonpoint source pollution). TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans. *See Alaska Center for the Environment* v. *Browner*, 20 F.3d 981, 984-85 (9th Cir. 1994). As such, TMDLs serve as a link in an implementation chain that includes federally-regulated point source controls, state or local plans for point and nonpoint source pollution reduction, and assessment of the impact of such measures on water quality, all to the end of attaining water quality goals for the nation's waters.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Garcia River TMDL

In 1992, California submitted to the EPA a list of waters pursuant to § 303(d)(1)(A). Pursuant to § 303(d)(2), the EPA disapproved California's 1992 list because it omitted seventeen water segments that did not meet the water quality standards set by California for those segments. Sixteen of the seventeen water segments, including the Garcia River, were impaired only by nonpoint sources of pollution.[5] After California rejected an opportunity to amend its § 303(d)(1) list to include the seventeen sub-standard segments, the EPA, again acting pursuant to § 303(d)(2), established a new § 303(d)(1) list for California, including those segments on it. California retained

---

[5] California had, however, previously included on its § 303(d)(1) list other waters polluted only by nonpoint sources of pollution.

the seventeen segments on its 1994, 1996, and 1998 § 303(d)(1) lists.

California did not, however, establish TMDLs for the segments added by the EPA. Environmental and fishermen's groups sued the EPA in 1995 to require the EPA to establish TMDLs for the seventeen segments, and in a March 1997 consent decree the EPA agreed to do so. *See Pacific Coast Fishermens Assocs.* v. *Marcus*, No. 95-4474. According to the terms of the consent decree, the EPA set March 18, 1998, as the deadline for the establishment of a TMDL for the Garcia River. When California missed the deadline despite having initiated public comment on a draft TMDL and having prepared a draft implementation plan, the EPA established a TMDL for the Garcia River. The EPA's TMDL differed only slightly from the state's draft TMDL.

The Garcia River TMDL for sediment is 552 tons per square mile per year, a sixty percent reduction from historical loadings. The TMDL allocates portions of the total yearly load among the following categories of nonpoint source pollution: a) "mass wasting" associated with roads; b) "mass wasting" associated with timber-harvesting; c) erosion related to road surfaces; and d) erosion related to road and skid trail crossings.

B. The Appellants

In 1960, appellants Betty and Guido Pronsolino purchased approximately 800 acres of heavily logged timber land in the Garcia River watershed. In 1998, after re-growth of the forest, the Pronsolinos applied for a harvesting permit from the California Department of Forestry ("Forestry").

In order to comply with the Garcia River TMDL, Forestry and/or the state's Regional Water Quality Control Board required, among other things, that the Pronsolinos' harvesting permit provide for mitigation of 90% of controllable road-related sediment run-off and contain prohibitions on

removing certain trees and on harvesting from mid-October until May 1.[6] The Pronsolinos' forester estimates that the large tree restriction will cost the Pronsolinos $750,000.

Larry Mailliard, a member of the Mendocino County Farm Bureau, submitted a draft harvesting permit on February 4, 1998, for a portion of his property in the Garcia River watershed. Forestry granted a final version of the permit after incorporation of a 60.3% reduction of sediment loading, a requirement included to comply with the Garcia River TMDL. Mr. Mailliard's forester estimates that the additional restrictions imposed to comply with the Garcia River TMDL will cost Mr. Mailliard $10,602,000.

Bill Barr, another member of the Mendocino County Farm Bureau, also applied for a harvesting permit in 1998 for his property located within the Garcia River watershed. Forestry granted the permit after incorporation of restrictions similar to those included in the Pronsolinos' permit. A forester states that these additional restrictions, included to comply with the TMDL, will cost Mr. Barr at least $962,000.

C. Proceedings Below

On August 12, 1999, the Pronsolinos, the Mendocino County Farm Bureau, the California Farm Bureau Federation, and the

---

[6] Specifically, the harvesting permit specified that the Pronsolinos must: "a) inventory controllable sediment sources from all roads, landings, skid trails and agricultural facilities by June 1, 2002; b) mitigate 90% of controllable sediment volume at 'road related' inventoried sites by June 1, 2012; c) prevent sediment loadings caused by road construction; d) retain five conifer trees greater than 32 inches in diameter at breast height . . . per 100 feet of all Class I and Class II watercourses (if the site lacks enough trees to comply, the five largest trees per 100 feet must be retained); e) harvest only during dry, rainless periods between May 1 and October 15; f) refrain from constructing or using skid trails on slopes greater than 40 degrees within 200 feet of a watercourse; and g) forbear from removing trees from certain unstable areas which have a potential to deliver sediment to a watercourse."

American Farm Bureau Federation brought this action pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702, 704, in the District Court for the Northern District of California against the EPA and two of its administrators. The Pronsolinos challenged the EPA's authority to impose TMDLs on rivers polluted only by nonpoint sources of pollution and sought a determination of whether the Act authorized the Garcia River TMDL.

The parties filed cross-motions for summary judgment. On August 6, 2000, the district court entered final judgment in favor of the EPA. The Pronsolinos timely filed this appeal.[7]

III. ANALYSIS

A. Deference to the EPA

As this is a summary judgment case, our review of the district court's decision is, of course, de novo. *See Oregon Natural Res. Council*, 834 F.2d at 844. Harder to answer is the question of the degree of deference we owe the EPA's regulations and decisions interpreting and applying CWA § 303.

The EPA argues that we owe deference to the interpretation of § 303 embodied in its regulations, pursuant to *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council*, 467 U.S. 837 (1984). An agency's statutory interpretation is entitled to *Chevron* deference if "Congress delegated authority to the agency

---

[7] The American Forest & Paper Association and the California Forestry Association intervened as intervenor-appellants. The Pacific Coast Federation of Fishermen's Associations and the Association of Metropolitan Sewerage Agencies intervened as intervenor-appellees. The Pacific Legal Foundation, Forest Landowners of California, and Oregon Lands Coalition filed an amici curiae brief in support of appellants. The States of California, Oregon, Washington, Delaware, Maine, Maryland, and New Jersey submitted an amici curiae brief in support of appellees. Westcas filed a brief as amicus curiae in support of either party but supporting reversal.

generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead*, 533 U.S. 218, 226-27 (2001). If *Chevron* deference applies, we must defer to the agency's interpretation as long as it is reasonably consistent with the statute. *Id.* at 229.

The Pronsolinos urge an approach at the opposite end of the deference spectrum, asserting that the EPA's interpretation should receive no deference at all because, they maintain, the EPA has inconsistently interpreted § 303(d) and has not included its current interpretation in a regulation that has the force of law. In between *Chevron* deference and no deference, however, lies another possibility. The Supreme Court in *Mead* recently clarified that agency interpretations that do not qualify for *Chevron* deference may nonetheless merit deference pursuant to *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). 533 U.S. at 237. Under *Skidmore*, we defer to the agency's position according to its persuasiveness. *Mead*, 533 U.S. at 221. Factors relevant to determining persuasiveness may include the agency's expertise, care, consistency, and formality, as well as the logic of the agency's position. *Id.* at 228 (citing *Skidmore*, 323 U.S. at 139-40). Thus, we must consider whether the EPA's interpretation is due *Chevron* deference, as the EPA argues; no deference, as the Pronsolinos argue; or, alternatively, *Skidmore* deference (and, if so, to what extent).

The EPA has the statutory authority to enact a rule carrying the force of law as to the issue at hand. The CWA delegates to the EPA the general rule-making authority necessary for the agency to carry out its functions under the Act. CWA § 501(a), 33 U.S.C. § 1361(a). One of those functions is to approve or disapprove the § 303(d)(1) list and any required TMDLs. § 303(d)(2). So the EPA has the delegated authority to enact regulations carrying the force of law regarding the identification of § 303(d)(1) waters and TMDLs. *See Mead*, 533 U.S. at 229.

The Pronsolinos do not contest the EPA's general rule-making authority but maintain that it has not been exercised, because no currently-operative EPA regulation *expressly* precludes the Pronsolinos' position that §§ 303(d)(1)(A) and (C) do not apply to rivers impaired only by nonpoint source pollution.[8] The pertinent regulations do, however, reflect the EPA's interpretation—that is, that the statute requires the identification on § 303(d)(1) lists of waters impaired only by nonpoint sources of pollution—and the EPA so reads its regulations.

The EPA regulations pertinent to § 303(d)(1) lists and TMDLs focus on the attainment of water quality standards, whatever the source of any pollution. For instance, the EPA's regulations define TMDLs as the "sum of the individual WLAs [wasteload allocations] for point sources and LAs [load allocations] for nonpoint sources and natural background." 40 C.F.R. § 130.2(i). Section 130.2 also defines a "wasteload allocation" as the "portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution," § 130.2(h), and a "load allocation" as the "portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources," § 130.2(g). The load allocation regulation also advises that, if possible, "natural and nonpoint source loads should be distinguished." *Id.* No reason appears why, under this TMDL definition, the amount of either point source loads or nonpoint source loads cannot be zero. If the wasteload allocation is zero, then the TMDL would

---

[8] In July 2000, the EPA published a final rule that, among many other provisions, amends its regulations expressly to require the inclusion on § 303(d)(1) lists of waters polluted only by nonpoint sources. 65 Fed. Reg. 43586 (July 13, 2000). As the EPA has published a final rule delaying until August 30, 2003, the effective date of the July 2000 final rule, 66 Fed. Reg. 53044 (Oct. 18, 2001), we do not consider the final rule's amendments in our analysis.

cover only the nonpoint sources and natural background sources. So read, the regulation provides that a TMDL can apply where there is no wasteload allocation for point source pollution. *See also, e.g.*, § 130.2 (referencing the establishment of TMDLs for nonpoint source pollution); 40 C.F.R. § 130.7(c)(1)(ii) (TMDLs must be established for *all* pollutants that prevent the attainment of water quality standards).

Section 130.7 evinces the same understanding. That regulation directs states to identify those waters listed pursuant to § 303(d)(1) that still require the establishment of TMDLs if:

> (i) Technology-based effluent limitations required by sections 301(b), 306, 307, or other sections of the Act;
>
> (ii) More stringent effluent limitations (including prohibitions) required . . . ; and
>
> (iii) Other pollution control requirements (e.g., best management practices) required by local, State, or Federal authority are not stringent enough to implement any water quality standards . . . applicable to such waters.

§ 130.7(b)(1). "Best management practices" pertain to nonpoint sources of pollution. CWA § 208, 33 U.S.C. § 1288; CWA § 319, 33 U.S.C. § 1329. So, again, § 130.7 does not distinguish between sources of pollution for purposes of applying the TMDL requirement. Instead, control requirements applicable to either type of pollution receive equal treatment in the quest to achieve water quality standards.

Also consistent with application of the § 303(d)(1) listing and TMDL requirements to waters impaired only by nonpoint sources is the regulation addressing water quality standards. Section 130.3 explains that "[s]uch standards serve the dual purposes of establishing the water quality goals for a specific water body and serving as the regulatory basis for establishment

of water quality-based treatment controls and strategies beyond the technology- based level of treatment required . . . ." 40 C.F.R. § 130.3. One purpose of water quality standards therefore—and not surprisingly—is to provide federally-approved goals to be achieved *both* by state controls and by federal strategies *other* than point-source technology-based limitations. This purpose pertains to waters impaired by both point and nonpoint source pollution. The regulations addressing states' water quality management plans, intended to attain the promulgated water quality standards, confirm this understanding. Such plans must include, among other things, TMDLs, effluent limitations, and "*nonpoint* source management and control." 40 C.F.R. § 130.6 (emphasis added).

In short, the EPA's regulations concerning § 303(d)(1) lists and TMDLs apply whether a water body receives pollution from point sources only, nonpoint sources only, or a combination of the two. The EPA has issued directives concerning the states' CWA § 303(d) requirements in conformity with this understanding of its regulations. *See, e.g.*, Memorandum from Geoffrey Grubbs, Director, EPA Assessment and Watershed Protection Division, to Water Quality Branch Chiefs and TMDL Coordinators (Aug. 13, 1992) (Section 303(d)(1)(A) "applies equally to segments affected by point sources only, a combination of point and nonpoint sources, and nonpoint sources only."); EPA, *National Clarifying Guidance for 1998 State and Territory Clean Water Act Section 303(d) Listing Decisions* 6 (1997) ("Consistent with long-standing EPA policy, regulations, and practice, States should include waterbodies impaired by nonpoint sources alone on 1998 section 303(d)(1)(A) lists . . . .").

In light of the current regulations and the agency's understanding of those regulations, as well as the delegated authority of the EPA to interpret the CWA, the EPA's interpretation is entitled to *Chevron* deference. *See Mead*, 533 U.S. at 226-27; *see also Auer* v. *Robbins*, 519 U.S. 452, 461

(1997) (stating that an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation") (citations and internal quotation marks omitted).

At the least, however, we owe the agency's interpretation substantial deference under *Skidmore*. *Cf. Mead*, 533 U.S. at 237 n.18 ("It is, of course, true that the limit of *Chevron* deference is not marked by a hard-edged rule."). Section 303(d) is one of numerous interwoven components that together make up an intricate statutory scheme addressing technically complex environmental issues. Confronted with an issue dependent upon, and the resolution of which will affect, a complicated, science-driven statute for which the EPA has delegated regulatory authority, we consider the EPA's interpretation of the issue informative. *See Mead*, 533 U.S. at 234 (noting the "specialized experience and broader investigations and information available" to agencies and "the value of uniformity in [ ] administrative and judicial understandings of what a national law requires") (citations and internal quotation marks omitted).

Appellants maintain that we should instead ignore the EPA's position, arguing that the Agency has not consistently interpreted the statute. We disagree with this characterization of the EPA's position over the thirty-year period since the enactment of the statute.

The first regulations promulgated after the enactment of the CWA in 1972 quite clearly required the identification on § 303(d)(1) lists of waters polluted only by nonpoint sources. The EPA defined as a "water quality" segment— again, those water bodies to be included on the § 303(d)(1) list, *see* 43 Fed. Reg. 60662, 60665 (Dec. 28, 1978)—any water "where it is known that water quality does not meet applicable water quality standards and/or is not expected to meet applicable water quality standards even after the application of the effluent

limitations required . . . ." 40 C.F.R. § 130.2(o)(1) (1978); *id.* (1977); *id.* (1976); 40 C.F.R. § 130.11(d)(1) (1975); *id.* (1974); *id.* (1973).[9] In contrast, the EPA defined as an "effluent limitation" segment—those waters making up the separate § 303(d)(3) list[10] —any water "where it is known that water quality is meeting and will continue to meet applicable water quality standards or where there is adequate demonstration that water quality will meet applicable water quality standards after the application of the effluent limitations required . . . ." 40 C.F.R. § 130.2(o)(2) (1978); *id.* (1977); *id.* (1976); 40 C.F.R. § 130.11(d)(2) (1975); *id.* (1974); *id.* (1973)[11]. Thus, if a water segment had not met, or would not soon meet, applicable water quality standards, regardless of the source of pollution, the EPA required its identification pursuant to § 303(d)(1)(A). In other words, the EPA initially interpreted § 303(d) exactly as it does today.[12]

---

[9] The 1973 regulation differed in an insignificant way from the text quoted.

[10] Section 303(d)(3) provides:

> For the specific purpose of developing information, *each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A)* and (1)(B)[waters for which controls on thermal discharges are not stringent enough for certain identified purposes] of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title[CWA § 304(a)(2)] as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

§ 303(d)(3) (emphasis added).

[11] Again, the 1973 regulation differed insignificantly from the quotation.

[12] The EPA overhauled its regulations in 1979 and provided almost no regulatory guidance as to the requirements of § 303(d) until the enactment in 1985 of the current regulations. *See* 44 Fed. Reg. 30016 (May 23, 1979) (repealing 40 C.F.R. part 130); *see also* 40 C.F.R. § 35.1511-1(d)(2) (1979);

The Pronsolinos nevertheless contend that the EPA's current interpretation is an invention of the early 1990s. They point out that until that time the EPA did not actively police the requirement that states include on their § 303(d)(1) lists waters polluted only by nonpoint source pollution. While that is true, that agency stance reflected a more general regulatory failure to enforce the § 303(d) requirements, not a failure with regard only to waters impaired by nonpoint sources. Until the early 1990s, the EPA focused its attention almost entirely on the new point source technological controls, to the exclusion of § 303(d) and the TMDL program. *See Pronsolino* v. *Marcus*, 91 F. Supp. 2d 1337, 1354 (N.D. Cal.2000)[13] (citing United States General Accounting Office, *Water Pollution: More EPA Action Needed to Improve the Quality of Heavily Polluted Waters, GAO Report to the Chairman: Subcommittee on Regulation and Business Opportunities Committee on Small Business, House of Representatives* (Jan.1989)); *see also id.* at 1353-54 (describing the history of EPA enforcement action with respect to § 303(d)); Oliver A. Houck, *The Clean Water Act TMDL Program: Law, Policy, and Implementation* 49-56 (1999) ("*The Clean Water Act TMDL Program*") (same). We have not found, and the Pronsolinos have not pointed to, any statement by the EPA—either in regulations or otherwise—that is inconsistent with the interpretation the agency now espouses.

In short, Congress entrusted to the EPA the responsibility of approving or disapproving § 303(d)(1) lists, bestowing upon it the discretion that comes with such responsibility; the EPA has specialized experience regarding the CWA which this court lacks; and the agency has consistently interpreted the provisions

---

§ 35.1521-4(a) (1979).

[13] The district court opinion in this case explains this history, as well as many other aspects of this case, carefully and lucidly. We therefore refer to that opinion at points rather than repeating its analysis.

at issue. We conclude that the EPA's interpretation is one to which we owe substantial *Skidmore* deference, at the very least. *See Mead*, 533 U.S. at 227-28.

In the end, though, it does not much matter in this case whether we review the EPA's position through the *Chevron* or *Skidmore/Mead* prism. Under both the more and less rigorous versions of the judicial review standard, the Agency's position is, as the discussion below indicates, more than sufficiently supported by the statutory materials.

B. Plain Meaning and Structural Issues

1. *The Competing Interpretations*

Section 303(d)(1)(A) requires listing and calculation of TMDLs for "those waters within [the state's] boundaries for which the effluent limitations required by section [301(b)(1)(A)] and section [301(b)(1)(B)] of this title *are not stringent enough to implement any water quality standard* applicable to such waters." § 303(d) (emphasis added). The precise statutory question before us is whether, as the Pronsolinos maintain, the term "not stringent enough to implement . . . water quality standard[s]" as used in § 303(d)(1)(A) must be interpreted to mean *both* that application of effluent limitations will not achieve water quality standards *and* that the waters at issue are subject to effluent limitations. As only waters with point source pollution are subject to effluent limitations, such an interpretation would exclude from the § 303(d)(1) listing and TMDL requirements waters impaired only by nonpoint sources of pollution.

The EPA, as noted, interprets "not stringent enough to implement . . . water quality standard[s]" to mean "not adequate" or "not sufficient . . . to implement any water quality standard," and does not read the statute as implicitly containing a limitation to waters initially covered by effluent limitations. According to the EPA, if the use of effluent limitations will not

implement applicable water quality standards, the water falls within § 303(d)(1)(A) regardless of whether it is point or nonpoint sources, or a combination of the two, that continue to pollute the water.

2. *The Language and Structure of § 303(d)*

Whether or not the appellants' suggested interpretation is entirely implausible, it is at least considerably weaker than the EPA's competing construction. The Pronsolinos' version necessarily relies upon: (1) understanding "stringent enough" to mean "strict enough" rather than "thoroughgoing enough" or "adequate" or "sufficient";[14] and (2) reading the phrase "not stringent enough" in isolation, rather than with reference to the stated goal of implementing "any water quality standard applicable to such waters." Where the answer to the question "not stringent enough for what?" is "to implement any [applicable] water quality standard," the meaning of "stringent" should be determined by looking forward to the broad goal to be attained, not backwards at the inadequate effluent limitations. One might comment, for example, about a teacher that her standards requiring good spelling were not stringent enough to assure good writing, as her students still used bad grammar and poor logic. Based on the language of the contested phrase alone, then, the more sensible conclusion is that the § 303(d)(1) list must contain any waters for which the particular

---

[14] Stringent means "rigorous, strict, thoroughgoing; rigorously binding or coercive." *Oxford English Dictionary Online* (2001). Defining "stringent" as "rigorous" or "strict" would lend support to the Pronsolinos' interpretation. If "stringent" means "thoroughgoing," however, § 303(d)(1)(A) would encompass the EPA's broader reading of the statute. Also, "stringent enough" may have a slightly different meaning from "stringent" standing alone, such as "adequate" or "sufficient." *See* 1 *Legislative History of the Water Pollution Control Act Amendments of 1972* at 792 (1973) (*Legislative History*) (H.R. Rep. 92-911 to accompany H.R. 11896 (March 11, 1972)) (using the term "are inadequate" in place of "not stringent enough.").

effluent limitations will not be adequate to attain the statute's water quality goals.

Placing the phrase in its statutory context supports this conclusion. Section 303(d) begins with the requirement that each state "identify those waters within its boundaries . . . ." § 303(d)(1)(A). So the statute's starting point for the listing project is a compilation of each and every navigable water within the state. Then, only those waters that will attain water quality standards after application of the new point source technology are excluded from the § 303(d)(1) list, leaving all those waters for which that technology will not "implement any water quality standard applicable to such waters." § 303(d)(1)(A); *see American Wildlands* v. *Browner*, 260 F.3d 1192, 1194 (10th Cir. 2001) ("[E]ach state is required to identify all of the waters within its borders not meeting water quality standards and establish [TMDLs] for those waters.") (citing § 303(d)); *Pronsolino*, 91 F. Supp. 2d at 1347. The alternative construction, in contrast, would begin with a subset of all the state's waterways, those that have point sources subject to effluent limitations, and would result in a list containing only a subset of that subset—those waters as to which the applicable effluent limitations are not adequate to attain water quality standards.

The Pronsolinos' contention to the contrary notwithstanding, no such odd reading of the statute is necessary in order to give meaning to the phrase "for which the effluent limitations required by section [301(b)(1)(A)] and section [301(b)(1)(B)] . . . are not stringent enough." The EPA interprets § 303(d)(1)(A) to require the identification of any waters not meeting water quality standards only if specified effluent limitations would not achieve those standards. 40 C.F.R. § 130.2(j). If the pertinent effluent limitations would, if implemented, achieve the water quality standards but are not in place yet, there need be no listing and no TMDL calculation. *Id.*

So construed, the meaning of the statute is different than it would be were the language recast to state only that "Each State shall identify those waters within its boundaries . . . [not meeting] any water quality standard applicable to such waters." Under the EPA's construction, the reference to effluent limitations reflects Congress' intent that the EPA focus initially on implementing effluent limitations and only later avert its attention to water quality standards. *See e.g.*, 1 *Legislative History* 71("The Administrator should assign secondary priority to [§ 303] to the extent limited manpower and funding may require a choice between a water quality standards process and early and effective implementation of the effluent limitation-permit program." (statement of Sen. Muskie, principal author of the CWA and the Chair of the Senate's Public Works Committee)); *see also Environmental Def. Fund, Inc.* v. *Costle*, 657 F.2d 275, 279 (D.C. Cir. 1981) (The 1972 CWA "assigned secondary priority to the [water quality] standards and placed primary emphasis upon both a point source discharge permit program and federal technology-based effluent limitations . . . .").[15]

Given all these language considerations, it is not surprising that the only time this court addressed the reach of § 303(d)(1)(A), it rejected a reading of § 303(d)(1)(A) similar to the one the Pronsolinos now proffer. In *Dioxin*, 57 F.3d at 1526-27, the plaintiffs argued that the phrase "not stringent enough" prohibited the EPA from listing under § 303(d)(1)(A) and establishing TMDLs for toxic pollutants, until after the implementation and proven failure of § 301(b)(1)(A) "best

---

[15] The district court expressed the same point differently: "The 1972 Act superimposed the technology-driven mandate of point-source effluent limitations. To assess the impact of the new strategy on the monumental clean-up task facing the nation, Congress called for a list of the unfinished business expected to remain even after application of the new cleanup strategy." *Pronsolino*, 91 F. Supp. 2d at 1347.

practicable technology" effluent limitations. Toxic pollutants, however, are not subject to "best practicable technology" controls,[16] but to more demanding "best available technology," precisely because of their toxicity. *Id.*

The court in *Dioxin* held that the EPA acted within its statutory authority in setting TMDLs for toxic pollutants, even though the effluent limitations referenced by § 303(d)(1)(A) did not apply to those pollutants. *Id.* at 1528. The court explained that, since best practical technology effluent limitations do not apply to toxic pollutants, those limitations are, as a matter of law, "not stringent enough" to achieve water quality standards. *Id.* In other words, *Dioxin* read § 303(d)(1)(A) as applying to all waters in the state, not only to the subset covered by certain kinds of effluent controls, and it understood "not stringent enough" to mean "not adequate for" or "inapplicable to."

Nothing in § 303(d)(1)(A) distinguishes the treatment of point sources and nonpoint sources as such; the only reference is to the "effluent limitations required by" § 301(b)(1). So if the effluent limitations required by § 301(b)(1) are "as a matter of law" "not stringent enough" to achieve the applicable water quality standards for waters impaired by point sources not subject to those requirements, then they are also "not stringent enough" to achieve applicable water quality standards for other waters not subject to those requirements, in this instance because they are impacted only by nonpoint sources. Additionally, the *Dioxin* court, applying *Chevron* deference, upheld the EPA's interpretation of § 303(d) "as requiring TMDLs where existing pollution controls will not lead to attainment of water standards," *id.* at 1527; *see also* 40 C.F.R. § 130.7(b), a holding that directly encompasses waters polluted only by nonpoint sources.

---

[16] Nor did the effluent limitations required by § 301(b)(1)(B) apply to the pollutants at issue.

3. *The Statutory Scheme as a Whole*

The Pronsolinos' objection to this view of § 303(d), and of *Dioxin*, is, in essence, that the CWA as a whole distinguishes between the regulatory schemes applicable to point and nonpoint sources, so we must assume such a distinction in applying §§ 303(d)(1)(A) and (C). We would hesitate in any case to read into a discrete statutory provision something that is not there because it is contained elsewhere in the statute. But here, the premise is wrong: There is no such general division throughout the CWA.

Point sources are treated differently from nonpoint sources for many purposes under the statute, but not all. In particular, there is no such distinction with regard to the basic purpose for which the § 303(d) list and TMDLs are compiled, the eventual attainment of state-defined water quality standards. Water quality standards reflect a state's designated *uses* for a water body and do not depend in any way upon the source of pollution. *See* § 303(a)-(c).

Nor is there any other basis for inferring from the structure of the Act an implicit limitation in §§ 303(d)(1)(A) and (C). The statutory subsection requiring water quality segment identification and TMDLs, § 303(d), appears in the section entitled "Water Quality Standards and Implementation Plans," not in the immediately preceding section, CWA § 302, 33 U.S.C. § 1312, entitled "Water Quality Related Effluent Limitations." So the section heading does not suggest any limitation to waters subject to effluent limitations. *Porter* v. *Nussle*, 122 S. Ct. 983, 990 (2002) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.") (citation omitted).

Additionally, § 303(d) follows the subsections setting forth the requirements for water quality standards, § 303(a)-(c)—which, as noted above, apply without regard to

the source of pollution—and precedes the "continuing planning process" subsection, § 303(e), which applies broadly as well. Thus, § 303(d) is structurally part of a set of provisions governing an interrelated goal-setting, information-gathering, and planning process that, unlike many other aspects of the CWA, applies without regard to the source of pollution.

True, there are, as the Pronsolinos point out, two sections of the statute as amended, § 208 and § 319, that set requirements exclusively for nonpoint sources of pollution. But the structural inference we are asked to draw from those specialized sections—that no *other* provisions of the Act set requirements for waters polluted by nonpoint sources—simply does not follow. Absent some irreconcilable contradiction between the requirements contained in §§ 208 and 319, on the one hand, and the listing and TMDL requirements of § 303(d), on the other, both apply.

There is no such contradiction. Section 208 provides for federal grants to encourage the development of state "areawide waste treatment management plans" for areas with substantial water quality problems, § 208(a), (f), and requires that those plans include a process for identifying and controlling nonpoint source pollution "to the extent feasible." § 208(b)(2)(F). Section 319, added to the CWA in 1987, directs states to adopt "nonpoint source management programs"; provides grants for nonpoint source pollution reduction; and requires states to submit a report to the EPA that "identifies those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of this chapter." § 319(a)(1)(A). This report must also describe state programs for reducing nonpoint source pollution and the process "to reduce, to the maximum extent practicable, the level of pollution" resulting from particular categories of nonpoint source pollution. § 319(a)(1)(C), (D).

The CWA is replete with multiple listing and planning requirements applicable to the same waterways (quite confusingly so, indeed), so no inference can be drawn from the overlap alone. *See, e.g.*, § 208(b); § 303(d)(1)(A), (d)(1)(B), (d)(3), (e); CWA § 304(l), 33 U.S.C. § 1314(l); CWA § 314, 33 U.S.C. § 1324(a); § 319(a). Nor are we willing to draw the more discrete inference that the § 303(d) listing and TMDL requirements cannot apply to nonpoint source pollutants because the planning requirements imposed by § 208 and § 319 are qualified ones—"to the extent feasible" and "to the maximum extent practicable"—while the § 303(d) requirements are unbending. For one thing, the water quality standards set under § 303 are functional and may permit more pollution than it is "feasible" or "practicable" to eliminate, depending upon the intended use of a particular waterway. For another, with or without TMDLs, the § 303(e) plans for attaining water quality standards must, without qualification, account for elimination of nonpoint source pollution to the extent necessary to meet those standards. § 303(e)(3)(F).

The various reporting requirements that apply to nonpoint source pollution are no more impermissibly redundant than are the planning requirements. Congress specifically provided that in preparing the § 319 report, states may rely on information from § 303(e), which incorporates the TMDLs. § 319(a)(2). Moreover, states must produce a § 319 report only once, but must update the § 303(d)(1) list periodically. § 319; § 303(d)(2). Also, the § 319 report requires the identification of a plan to reduce nonpoint source pollution, without regard to the attainment of water quality standards, while the plans generated using the § 303(d)(1) lists and TMDLs are guided by the goal of achieving those standards. § 319; § 303(d), (e).

Essentially, § 319 encourages the states to institute an approach to the elimination of nonpoint source pollution similar to the federally-mandated effluent controls contained in the CWA, while § 303 encompasses a water quality based approach

applicable to all sources of water pollution. As various sections of the Act encourage different, and complementary, state schemes for cleaning up nonpoint source pollution in the nation's waterways, there is no basis for reading any of those sections—including § 303(d)—out of the statute.

There is one final aspect of the Act's structure that bears consideration because it supports the EPA's interpretation of § 303(d): The list required by § 303(d)(1)(A) requires that waters be listed if they are impaired by a combination of point sources and nonpoint sources; the language admits of no other reading. Section 303(d)(1)(C), in turn, directs that TMDLs "shall be established at a level necessary *to implement* the applicable water quality standards . . . ." *Id.* (emphasis added). So, at least in blended waters, TMDLs must be calculated with regard to nonpoint sources of pollution; otherwise, it would be impossible "to implement the applicable water quality standards," which do not differentiate sources of pollution. This court has so recognized. *Browner*, 20 F.3d at 985 ("Congress and the EPA have already determined that establishing TMDLs is an effective tool for achieving water quality standards in waters impacted by non-point source pollution.").

Nothing in the statutory structure—or purpose—suggests that Congress meant to distinguish, as to § 303(d)(1) lists and TMDLs, between waters with one insignificant point source and substantial nonpoint source pollution and waters with only nonpoint source pollution. Such a distinction would, for no apparent reason, require the states or the EPA to monitor waters to determine whether a point source had been added or removed, and to adjust the § 303(d)(1) list and establish TMDLs accordingly. There is no statutory basis for concluding that Congress intended such an irrational regime.

Looking at the statute as a whole, we conclude that the EPA's interpretation of § 303(d) is not only entirely reasonable

but considerably more convincing than the one offered by the plaintiffs in this case.[17]

C. Federalism Concerns

The Pronsolinos finally contend that, by establishing TMDLs for waters impaired only by nonpoint source pollution, the EPA has upset the balance of federal-state control established in the CWA by intruding into the states' traditional control over land use. *See Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001). That is not the case.

The Garcia River TMDL identifies the maximum load of pollutants that can enter the Garcia River from certain broad categories of nonpoint sources if the river is to attain water quality standards. It does not specify the load of pollutants that may be received from particular parcels of land or describe what measures the state should take to implement the TMDL. Instead, the TMDL expressly recognizes that "implementation and monitoring" "are state responsibilities" and notes that, for this reason, the EPA did not include implementation or

---

[17] It is therefore unnecessary to examine the legislative history. *See Dep't of Hous. and Urban Dev.* v. *Rucker*, 122 S. Ct. 1230, 1234 (2002). Nonetheless, we have reviewed that history and considered the legislative history arguments put forth by the Pronsolinos. The thrust of those arguments mirrors the arguments based on the statute's language and structure, addressed above. We reject them for the same reason: That Congress meant to *include* waters impaired by point sources where technological controls had not attained water quality standards—as the legislative history shows, 1 *Legislative History* 792-93 (H.R. Rep. 92-911 to accompany H.R. 11896 (March 11, 1972))—does not prove that it intended to *exclude* nonpoint sources from the TMDL requirement.

monitoring plans within the TMDL.[18] EPA, *Garcia River Sediment Total Maximum Daily Load* 43 (Mar. 16, 1998).

Moreover, § 303(e) requires—separately from the § 303(d)(1) listing and TMDL requirements—that each state include in its continuing planning process "adequate implementation, including schedules of compliance, for revised or new water quality standards" "for all navigable waters within such State." § 303(e)(3). The Garcia River TMDL thus serves as an informational tool for the creation of the state's implementation plan, independently—and explicitly—required by Congress.

California chose both *if* and *how* it would implement the Garcia River TMDL. States must implement TMDLs only to the extent that they seek to avoid losing federal grant money; there is no pertinent statutory provision otherwise requiring implementation of § 303 plans or providing for their enforcement. *See* CWA § 309, 33 U.S.C. § 1319; CWA § 505, 33 U.S.C. § 1365.[19]

---

[18] The regulatory amendments scheduled to go into effect August 30, 2003, do require the inclusion of an implementation plan as part of each TMDL. 65 Fed. Reg. 43586 (July 13, 2000); *see also* 66 Fed. Reg. 53044 (Oct. 18, 2001) (effective date). We express no opinion as to the validity of this requirement.

[19] See also Professor Houck's summary:

> Within the statutory scheme § 319 is the carrot, funding state programs for nonpoint source abatement statewide, for all waters whether they are currently above standard or below. In keeping with its broad sweep, § 319's provisions are voluntary. States may choose to participate or not . . . . Section 303(d), on the other hand, addresses a narrower and more nasty job: the chronically polluted waters of the United States. For this problem zone, enter a stick: quantified pollution load allocations. The nature of the allocations and of the implementing controls remains up to the states, but states do have to come up with them.

The Clean Water Act TMDL Program 62.

Finally, it is worth noting that the arguments that the Pronsolinos raise here would apply equally to nonpoint source pollution controls for blended waters. Yet, as discussed above, Congress definitely required that the states or the EPA establish TMDLs for all pollutants in waters on § 303(d)(1) lists, including blended waters.

We conclude that the Pronsolinos' federalism basis for reading § 303 against its own words and structure is unfounded.

IV. CONCLUSION

For all the reasons we have surveyed, the CWA is best read to include in the § 303(d)(1) listing and TMDLs requirements waters impaired only by nonpoint sources of pollution. Moreover, to the extent the statute is ambiguous—which is not very much—the substantial deference we owe the EPA's interpretation, under either *Chevron* or *Skidmore*, requires that we uphold the agency's more than reasonable interpretation. We therefore hold that the EPA did not exceed its statutory authority in identifying the Garcia River pursuant to § 303(d)(1)(A) and establishing the Garcia River TMDL, even though the river is polluted only by nonpoint sources of pollution.

The decision of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 00-16026, 00-16027.

Guido A. Pronsolino, et al.,

Plaintiffs-Appellants,

v.

Felicia Marcus, Regional Administrator, United States Environmental Protection Agency Region 9, et al.,

Defendants - Appellees,

Pacific Coast Federation of Fishermen's Associations, a California Non-Profit corporation, et al.,

Defendant-Intervenors-Appellees.

ORDER

[Filed October 9, 2002]

Before: HALL, WARDLAW and BERZON, Circuit Judges

The panel has unanimously voted to deny appellee's petition for rehearing. Judge Wardlaw and Judge Berzon have voted to deny the petition for rehearing en banc. Judge Hall recommends denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 99-01828 WHA.

Guido A. Pronsolino and Betty J. Pronsolino as Trustees for the Guido A. Pronsolino and Betty J. Pronsolino Trust, the Mendocino County Farm Bureau, the California Farm Bureau Federation, and the American Farm Bureau Federation,

Plaintiffs,

v.

Felicia Marcus, Regional Administrator, United States Environmental Protection Agency Region 9, Carol M. Browner, Administrator, United States Environmental Protection Agency, and the United States Environmental Protection Agency,

Defendants.

March 30, 2000.

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT REGARDING AUTHORITY OF ENVIRONMENTAL PROTECTION AGENCY UNDER THE CLEAN WATER ACT TO LIST SUBSTANDARD RIVERS AND WATERS AND TO ISSUE TMDLS FOR THEM

INTRODUCTION

In this case of first impression, the issue is whether Section 303(d) of the Federal Water Pollution Control Act Amendments of 1972, later renamed the Clean Water Act, authorized the Environmental Protection Agency to determine "total maximum daily loads" for rivers and waters polluted only by logging and agricultural runoff and/or other nonpoint sources rather than by any municipal sewer and/or industrial point sources. 33 U.S.C. § 1313(d). The issue gathers importance from the fact that "nonpoint source pollution has become the dominant water quality problem in the United States, dwarfing all other sources of volume . . . ."[1] According to EPA, 54% of California's substandard rivers and waters are impaired by nonpoint sources only and another 45% are impaired by a combination of both point and nonpoint sources (EPA Tab 23).

STATEMENT

Plaintiffs Guido and Betty Pronsolino own forested land along the Garcia River in the North Coast of California. When they obtained a permit to harvest timber, the California Department of Forestry ("CDF") imposed restrictions designed to reduce soil erosion into the Garcia River. The restrictions include measures such as leaving certain large conifers standing.[2] Plaintiffs contend that the conditions are onerous and

---

[1] Houck, *TMDLs, Are We There Yet?: The Long Road Toward Water-Quality Based Regulation Under the Clean Water Act*, 27 ELR 10391, 10399 (Aug. 1997).

[2] The conditions included the following: that the Pronsolinos: (a) inventory controllable sediment sources from all roads, landings, skid trails and agricultural facilities by June 1, 2002; (b) mitigate 90% of controllable sediment volume at "road related" inventoried sites by June 1, 2012; (c) prevent sediment loading caused by road construction; (d) retain five conifer trees greater than 32 inches in diameter at breast height ("dbh") per 100 feet of all Class I and Class II watercourses (if the site lacks enough trees to

costly. They argue that CDF imposed these restrictions in order to implement a criterion known as a "total maximum daily load" ("TMDL") set by EPA for the Garcia River. Seeking to strike at the root of their problem, the Pronsolinos brought this action under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, to challenge EPA's authority to impose TMDLs on rivers polluted only by timber-harvesting and agricultural runoff and/or other nonpoint sources, as is concededly the case for the Garcia River. Joining them as plaintiffs are the Mendocino County Farm Bureau, the California Farm Bureau and the American Farm Bureau Federation, all of whom dispute EPA's authority to set TMDLs for such rivers.

The Garcia River runs through southwestern Mendocino County into the Pacific Ocean. The river was once flourished as a spawning ground for cold-water fish such as coho salmon and steelhead trout. Excess sediment from logging operations over many years in the region hurt, perhaps severely, the spawning and reproduction of these fish in the Garcia River (and other North Coast rivers).[3] In 1966, one journal reported that one-half of "potential coho salmon's habitat in the Garcia River...was reported as moderately to severely damaged by ongoing logging practices" (quoted in *Brown, et al.*, Historical Decline & Current Status of Coho Salmon in California, 14 No. Am. J. of

---

comply, the five largest trees per 100 feet must be retained); (e) harvest only during dry, rainless periods between May 1 and October 15; (f) refrain from constructing or using skid trails on slopes greater than 40% within 200 feet of a watercourse; and (g) forbear removing trees from certain unstable areas which have a potential to deliver sediment to a watercourse. These recommendations were incorporated into the Pronsolinos' NTMP (Joint Stmt. ¶ 32).

[3] Coho salmon were recently listed by the National Marine Fisheries Service as a threatened species. 61 Fed. Reg. 56138 (Oct. 31, 1996). The Service also recently proposed to list steelhead trout as threatened for the same region. 63 Fed. Reg. 13347 (Mar. 19, 1998).

Fisheries Management 237, 251 (May 1994)). By 1998, a staff report on the Garcia River by the California Regional Water Control Board stated that "[t]he Garcia River and its tributaries have experienced a reduction in the quality and amount of instream habitat that is capable of fully supporting the beneficial use of cold-water fishery, due to increased sedimentation" (Exh. C to Pacific Coast Federation Memorandum at 4). Prior to 1992, California established water-quality standards for the river that include protection of these fish and their habitat (EPA Tabs 8-9). Recent years have seen improvement in the Garcia River, but the restrictions imposed by CDF are intended to further restore the fish habitat.

Although Section 303(d) of the Clean Water Act required the states and EPA to identify certain substandard waters and to set TMDLs for them a generation ago, the Garcia River and other North Coast rivers escaped their gaze until recently. In 1992, EPA required California to add the Garcia River and sixteen other North Coast waters to its list of substandard waters. Thereafter, California retained the same waters on its list in 1994, 1996 and 1998. Meanwhile, a group of fishermen and environmental groups sued EPA, alleging that the then-recent addition of the Garcia River and sixteen other water segments to California's list of substandard waters meant that California and/or the EPA had to prepare TMDLs for the rivers. That case ended in a consent decree in March 1997 requiring TMDLs for all the rivers. Consent Decree, *Pacific Coast Federation of Fishermen's Association* v. *Marcus, et al.*, No. 95-4474 MHP (Mar. 6, 1997).

Pursuant to the consent decree, EPA set March 16, 1998, as the deadline for the establishment of a TMDL for the Garcia River. California's North Coast Regional Water Quality Control Board initiated public comment on a draft TMDL but missed the deadline. EPA immediately released its own TMDL for the Garcia River (which was only slightly different from the state

draft (Pl. Tab 25)). The EPA TMDL was sensitive to the fish-habitat problem (EPA Tab 1 at 8, 9 and 12):

> Brown et al. (1994) reports that coho salmon previously occurred in as many as 582 California streams from the Smith River near the Oregon border to the San Lorenzo River on the central coast. There are now probably less than 5,000 native coho salmon spawning in California each year, many in populations of less than 100 individuals. Coho populations today are probably less than 6% of what they were in the 1940s and there has been at least 70% decline since the 1960s. Brown et al. (1994) conclude that the reasons for the decline of coho salmon in California include: stream alterations brought about by poor land-use practices and by the effects of periodic floods and drought, the breakdown of genetic integrity of native stocks, introduced diseases, over harvest, and climatic change.
>
> * * *
>
> The Garcia River watershed has experienced a reduction in the quality and quantity of instream habitat which is capable of supporting the cold water fishery, particularly that of coho salmon and steelhead. Controllable factors contributing to this habitat loss include the acceleration of sediment production and delivery due to land management activities and the loss of instream channel structure necessary to maintain the system's capacity to efficiently store, sort and transport delivered sediment.

Overall, the TMDL for the Garcia River called for a sixty percent reduction of sediment (Joint Stmt. ¶ 15).[4] The TMDL set the total maximum amount of sediment loading at an average of 552 tons per square mile per year and allocated portions of this total load to various categories of nonpoint sources in the Garcia River watershed (Joint Stmt. ¶ 12). The various categories of nonpoint sources were: (a) mass wasting associated with roads; (b) mass wasting associated with timber-harvesting activities; (c) erosion related to road surfaces; and (d) erosion related to road and skid trail crossings and gullies from diversions on roads and skid trails (Joint Stmt. at ¶ 16). In order to achieve these load allocations, the TMDL called for percentage reductions in sediment loading from these nonpoint sources (Joint Stmt. at ¶¶ 14, 15). There were only "slight differences" between the regional board's pending TMDL and the EPA's TMDL as issued (Pl. Tab 25).

The regional board concluded that if it did not implement EPA's TMDL, then EPA could withdraw federal funding to the

---

[4] EPA's regulations on TMDLs were issued in 1985. 40 C.F.R. § 130.7. The record herein contains a summary of the TMDL process (EPA Tab 7 at 2):

> The TMDL process, in essence, is the following: States identify specific waters where problems exist or are expected; States set priorities; States allocate pollutant loadings among point and nonpoint sources; and EPA approves State actions or acts in lieu of the State if necessary. Point and nonpoint sources then reduce pollutants to achieve the pollutant loadings established by the TMDL through a wide variety of Federal, State, Tribal, and local authorities, programs, and initiatives.
>
> States have primary responsibility for developing lists and TMDLs under section 303(d). Section 303(d)(1)(A) and the implementing regulations (at 40 C.F.R. § 130.7(b)) provide States with latitude to determine their own priorities for developing and implementing TMDLs. In particular, the flexibility to States offered by the priority ranking process of section 303(d)(1)(A) is a good opportunity for incorporating rotating basin or other watershed approaches into the TMDL process.

state agency. CDF, the state agency charged with approving timber-harvesting plans, such as those required of plaintiffs under state law, also believed that failure to implement the TMDL would imperil federal funding. In this connection, the Clean Water Act calls upon the states to incorporate whatever TMDLs are authorized for listed rivers and waters—the question here being whether a TMDL was authorized at all.

Plaintiffs' forester estimated that TMDL compliance would cost the Pronsolinos upwards of $750,000. Larry Mailliard and Bill Barr, members of plaintiff Mendocino County Farm Bureau, are similarly situated. They estimated their compliance would cost $10,602,000 and $962,000 respectively. This suit was filed on April 12, 1999, seeking a determination whether a TMDL for the Garcia River was authorized by the Clean Water Act.

ANALYSIS

The general issue presented is the extent to which logging and agricultural runoff and other nonpoint sources of pollution are relevant in the listing-and-TMDL process of Section 303(d) of the Clean Water Act of 1972. 33 U.S.C. 1313(d). Put more narrowly, the issue is whether listing and TMDLs are required for rivers and waters polluted only by logging and agricultural runoff and/or other nonpoint sources, such as the Garcia River.

The landscape is illuminated by the events leading to the enactment. Under the Federal Water Pollution Control Act of 1948, 62 Stat. 1155, the primary responsibility for control rested with the states. In 1965, the Water Quality Act required each state to develop comprehensive water-quality standards for *interstate* waters, taking into account, among other factors, the "propagation of fish and wildlife." 79 Stat. 903. Such standards did not identify and directly regulate pollutants. Rather, they stated a desired condition of the water. Reasonable discharges were inherently permitted under these standards. See William

H. Rogers, Jr., *Environmental Law* 252, 259-62 (2d ed.1994). In 1966, however, the Refuse Act of 1899, 30 Stat. 1152, was reinvigorated by the Supreme Court. *United States* v. *Standard Oil Co.*, 384 U.S. 224, 230 (1966), held that all discharges of all foreign substances and pollutants (except those flowing from streets and sewers as liquids) were illegal without a permit from the Army Corps of Engineers. This set up a clash between the absolute prohibition of the Refuse Act and the reasonable-discharge approach of the standards. The Court of Appeals for the Third Circuit resolved this clash in favor of the Refuse Act in *United States* v. *Pennsylvania Industrial Chemical Corp.*, 461 F.2d 468 (3d Cir. 1972). These developments led to the legislation in 1972 now known, together with subsequent amendments, as the Clean Water Act. The 1972 Act was provoked by a groundswell of sustained popular support for genuine water restoration and environmental legislation. The Act became law over a presidential veto.

The Supreme Court, although it has never faced the issue now presented, has consistently referred to the 1972 Act as intended "to establish an all-compassing program of water pollution regulation" and "to establish a comprehensive long-range policy for the elimination of water pollution." Repeatedly, the Supreme Court has used the word "comprehensive" to describe the Act. *E.g.*, *Milwaukee* v. *Illinois*, 451 U.S. 304, 318-19 (1981); *Arkansas* v. *Oklahoma*, 503 U.S. 91, 99 (1992). The Act anticipated "a partnership" between the states and the federal government, "animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Id.* at 101. Achievement of "water quality which provides for the protection and propagation of fish, shellfish and wildlife" was an express statutory objective. 86 Stat. 816.

The 1972 Act represented a major shift in enforcement policy—away from primary reliance on water-quality standards

and toward primary reliance on specific effluent limits on all point sources, the latter being any discernible, confined and discrete conveyance such as a pipe or ditch. 33 U.S.C. § 1362(14). The Act established the National Pollution Discharge Elimination System ("NPDES") and required an NPDES permit for any discharge by any point source into any navigable water of the United States, interstate or intrastate. The new strategy sought to force the best technology practicable or achievable on dischargers. By 1977, industry was required to meet effluent limitations achievable through "best practicable control technology currently available." By 1983, it was to achieve control levels based on the "best available technology economically available." 33 U.S.C. § 1311. Instead of solely working backwards from the water-quality standards to develop acceptable levels of effluent from point sources, the new lead strategy was to require point sources to employ state-of-the-art treatment, even if it led, as a happy circumstance, to even cleaner water than called for by the standards. EPA was to issue NPDES permits except to the extent states adopted EPA-approved NPDES programs.

The Structure of the 1972 Act

Although the technology-based strategy of effluent limitations on all point sources (the NPDES permit program) was its capstone, the 1972 Act nonetheless carried forward the pre-existing regime of water-quality standards and even extended that regime to all navigable waters of the United States, interstate or intrastate. The Act explicitly recognized the separate problems of point versus nonpoint pollution and established different approaches to mitigate them. Point sources were subjected to NPDES regulation (under Sections 301-02 and 402). Nonpoint sources were left subject to state regulation. How TMDLs were supposed to fit into both branches of the solution is the problem presented by this case.

In analyzing this issue, it is important to bear in mind the comprehensive way in which *all* sources of pollution were addressed by the 1972 Act, albeit in different ways. It is important also to focus on the language actually adopted in 1972 (rather than in later amendments) because the issue here turns on the meaning of the 1972 language. The NPDES program has already been described. The following review of the structure of the 1972 Act focuses on those provisions arguably relevant to TMDLs and/or nonpoint-source pollution.

Under Section 102(a) of the 1972 Act, EPA was to cooperate with other state and federal agencies, municipalities and industry to "prepare or develop comprehensive programs for preventing, reducing or climinating the pollution of the navigable waters," giving "due regard" to "the protection and propagation of fish and aquatic life and wildlife," among other purposes. 86 Stat. 817. Under Section 104(n) and (p), EPA was to promote "continuing comprehensive studies of the effects of pollution, including sedimentation in the estuaries and estuarine zones of the United States on fish and wildlife, on sport and commercial fishing . . . " (86 Stat. 823) and to "carry out a comprehensive study and research program to determine new and improved methods and the better application of existing methods of preventing, reducing, and eliminating pollution from agriculture . . . ." 86 Stat. 824. In sum, while these provisions did not reference TMDLs, they called for "comprehensive" programs and studies, including protection of fish and wildlife.

Section 201 authorized grants for "waste treatment management" on an "areawide" basis to "provide control or treatment of all point and nonpoint sources of pollution . . . ." § 201(c). In turn, Section 208 called for "areawide waste treatment management" planning by the states, expressly including plans for "nonpoint source" pollution. To that end, EPA was required to publish regulations guiding the identification of areas with "substantial water quality control

problems." § 208(a)(1). The states were then to identify such areas. § 208(a)(2). Within one year thereof, responsible state organizations were called upon to "have in operation a continuing areawide waste treatment management planning process" with initial plans certified to EPA within two years. § 208(b)(1). Such plans were to include a number of components, the most germane of which was explicitly directed at "nonpoint source" pollution. Under Section 208(b)(2)(F), for example, the plans had to include:

> a process to (i) identify, if appropriate, *agriculturally and silviculturally related nonpoint sources of pollution*, including runoff from manure disposal areas, and from land used for livestock and crop production, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources [emphasis added];

The Section 208 process was summarized succinctly by a 1981 textbook on nonpoint-source pollution as follows:

> Specifically, Section 208 of the act calls for area-wide water pollution planning in areas designed by the governor of each state that would include both point and nonpoint sources and pollution abatement programs. The plans should include: (a) identification of the treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the area with associated construction priorities, time schedules, and the establishment of regulatory programs for such treatment works, including urban runoff and storm water; (b) identification of the sources of nonpoint pollution—agriculture (including runoff from irrigated fields), silviculture, runoff from land used for livestock and crop production or land that has had manure applied to it, mining, saltwater intrusion, waste disposal on lands, disposition of all residual waste generated in the

> designated area, and land and subsurface excavations; (c) setting forth of a procedure and methods (including land-use requirements) that feasibly will control such sources.

Novotny & Chesters, *Handbook of Nonpoint Pollution* 19 (1981). In short, Section 208 contemplated that nonpoint sources would be remedied through state regulation and required the states to develop programs to do so.

Turning to Section 303, at the core of this controversy, its title was "Water Quality Standards and Implementation Plans." Subsection (a) required the states to adopt water-quality standards promptly, to the extent not previously done, and to carry forward those already adopted (subject to further EPA approval). Standards were to be set, as stated, for both interstate and intrastate waters. Subsection (c) imposed periodic updating of the standards and submission to EPA for review and approval. Standards were to take into account the unique needs of each waterway, including "propagation of fish and wildlife" as well as "agricultural...and other purposes." 86 Stat. 848. Subsection (b) instructed EPA to impose its own standards on any state failing to set standards. 86 Stat. 847. These standards, the Supreme Court has said (once again), were meant by Congress to be "comprehensive." *PUD No. 1 of Jefferson County* v. *Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994).

Significantly, in the process of setting standards, Section 303 did not exempt any rivers or waters—all were covered to the full extent of federal authority over navigable waters. Nor was any distinction drawn between point sources and nonpoint sources. The goal was to set standards for all navigable waterways in America, balanced and tailored to accommodate the various needs of each, including, explicitly, the need for the protection of fish and wildlife. The standards-setting process of Section 303 plainly applied to waters polluted by point sources

as well as nonpoint sources, either alone or in combination. All parties agree on this conclusion.

It was onto this comprehensive standards regime that Congress imposed the requirement at issue, a requirement subdivided into a listing and a TMDL. As to the first, Section 303(d)(1)(A) provided:

> Each state shall identify those waters within its boundaries for which the effluent limitations required by Section 301(b)(1)(A) and 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

Section 303(d) thus became an intersection between the old and new strategies. It called for an assessment of the expected beneficial impact of the main innovation of the Act—imposition of the best effluent reduction technology could supply. If those reductions alone would bring a waterway into compliance with standards, well and good. If not, then Section 303(d)(1) required the waterway to join a list of unfinished business.[5] That list, once completed, then had to be prioritized by the states. For each listed river and water, Section 303(d)(1)(D) of the Act next required the states to establish TMDLs:

> Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total daily maximum load, for those pollutants which the Administrator identifies

---

[5] Professor Oliver Houck states: "The rationale was that water quality standards would clean up waters which remained substandard after application of technology-based limits." Houck, 27 ELR at 10337.

> under Section 304(a)(2) as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

TMDLs were thus required for all listed rivers and waters, at least as to pollutants identified by EPA as suitable for such calculation (and EPA long ago stated that "all" pollutants were suitable for such calculation).[6] The controversy herein is whether the Garcia River should have been listed at all.[7] Plaintiffs say no, it should not have been and, therefore, EPA should never have issued its TMDL. Before addressing this argument, it is instructive to complete the remainder of the structural review.

The next step—under Section 303(d)(2)—was for the State to submit the prioritized list and TMDLs for EPA review and for EPA to either approve or disapprove them. To repeat, EPA was statutorily required to approve or disapprove the lists and the TMDLs. If approved, then the state was "to incorporate" the lists and TMDLs into its "continuing planning process" under Section 303(e). If disapproved, EPA was to revise the list and/or TMDLs so as to implement the applicable water-quality standards. As revised, the state was then "to incorporate" them into its planning under Section 303(e). Either way, the lists and TMDLs were obliged to be incorporated into the states'

---

[6] 43 Fed. Reg. 60662 (Dec. 28, 1978).

[7] EPA's regulations call it a list of "water-quality" limited segments. 40 C.F.R. § 130.7(b).

continuing planning process, a process summarized momentarily.[8]

As to nonlisted rivers and waters, Section 303(d)(3) imposed an "informational" TMDL requirement regarding fish and wildlife:

> For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under Section 304(a)(2) as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

As stated, this provision applied only to nonlisted waters. The informational TMDLs were not subject to EPA review. EPA was not authorized to review or to issue the "informational" TMDLs. This provision sought establishment of state-prepared TMDLs that would "assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife." They, too, were intended for the continuing planning process.[9]

---

[8] The Act does not define total maximum daily load. EPA's regulations break it into a "wasteload allocation" for point sources and a "load allocation" for nonpoint sources. 40 C.F.R. § 130.2.

[9] Although the water-quality standards themselves were supposed to take "into consideration" the "propagation of fish and wildlife," those standards also had to take into account the "use and value" of the waters for a number of other purposes. 33 U.S.C. § 1313(c)(2). As a result, a standard itself might be a compromise of competing considerations. The TMDL requirement of Section 303(d)(3) would specifically help the states identify the extent and types of pollution injurious to fish and wildlife.

Section 303(e) imposed on the states "a continuing planning process" reviewable by EPA for consistency with the Act. EPA was to approve "any continuing planning process" that would result in "plans for *all* navigable waters within such state . . . which were to include, among other things, *total maximum daily loads for pollutants* in accordance with subsection (d)" (emphasis added). Subsection (d), in turn, covered both the TMDLs for listed waters and "informational" TMDLs. The plans also were required to include the "area-wide waste management plans" under Section 208. In turn, as seen, those plans had to include "a process" to identify "nonpoint sources of pollution" and "methods (including land-use requirements) to control" them. The Section 303(e) plans were also expected to include "adequate implementation, including schedules of compliance, for revised or new water quality standards." In short, the mandatory planning process of Section 303(e) covered "all navigable waters" and was to address "adequate implementation" of all water-quality standards, had to include plans incorporating TMDLs, and had to address "nonpoint sources of pollution." A wild river, therefore, polluted only by logging in its watershed, was clearly meant to benefit from the continuing planning process.

Section 304 was entitled "Information and Guidance." Section 304(a) generally called for EPA-set "criteria for water quality accurately reflecting the latest scientific knowledge" including impacts on fish and wildlife. EPA was to develop "information"

> (A) on the factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters, ground waters, waters of the contiguous zone, and the oceans; (B) on the factors necessary for the protection and propagation of shellfish, fish, and wildlife for classes and categories of receiving waters and to allow recreational activities in and on the water; and (C) on the measurement and classification of water quality; and (D)

> *for the purposes of section 303, on and the identification of pollutants suitable for maximum daily load measurement correlated with the achievement of water quality objectives.*

§ 304(a)(2) (emphasis added). In requiring "identification of pollutants suitable" for the TMDL measurements of Section 303, no distinction was drawn between point and nonpoint sources in Section 304(a). That provision was comprehensive. In contrast, Section 304(b) focused only on point sources. It required EPA to issue guidelines for effluent limitations. Section 304(e) focused only on "nonpoint sources of pollution." It required EPA to issue "(1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants and (2) processes, procedures, and methods to control pollution resulting from . . . agriculture and silvicultural activities, including runoff from fields and crop and forest lands." 86 Stat. 852. Section 304(a), in short, covered all sources of pollutants and called for a predicate step for the TMDL process at issue.

Section 305, labeled "Water Quality Inventory," called for an EPA-led report by January 1, 1974 that described the "specific quality," during 1973, "of all navigable waters" that included a roster of all point sources discharging into said waters, and that identified "specifically those navigable waters, the quality of which is adequate to provide for the protection and propagation of shellfish, fish and wildlife," among other things. Starting in January 1975, each state was to submit an annual report to EPA that described the water quality of all "navigable waters" within its borders, analyzing the extent to which "all navigable waters" within the state provided for the protection of shellfish, fish and wildlife, analyzing the extent to which eliminating the discharge of pollutants and a level of water quality provided for the protection and propagation of shellfish, fish and wildlife, and among other things (§ 305(b)(1)(E), 86 Stat. 854):

> a description of the nature and extent of nonpoint sources of pollutants, and recommendations as to the programs which must be undertaken to control each category of such sources, including an estimate of the costs of implementing such programs.

Section 305 made clear that no river or water in the United States was immune from its process; all navigable waters were covered; nonpoint-source pollution was to be analyzed without exception.

In summary, the 1972 Act addressed all sources of pollution, although each type in different ways. It sought comprehensively to protect and to restore all navigable waters in America. Although Congress imposed direct NPDES regulation *only* on point sources, Congress plainly carried forward the pre-existing regime of water-quality standards and, indeed, expanded it to include intrastate waters. That regime was intended (in part) to mitigate nonpoint-source pollution through state land-use regulation. These general conclusions are not really in dispute in this case.

Construction of Section 303(d)

The issue on which the parties divide is the extent to which nonpoint sources of pollution were to count in assembling the substandard-waters list required by Section 303(d) and in preparing the corresponding TMDLs. In their opening brief, plaintiffs contended that the listing and TMDL requirements of Section 303(d) were "exclusively reserved for point sources" (Pl.Br.14) and that "Section 303(d) focuses solely on point sources" (Pl.Br.16). In their reply (at 8), plaintiffs stated: "A water body that is impaired by both point and nonpoint sources should be listed under both Section 303(d) and Section 319(a)(1)(A) and the point and nonpoint sources be addressed pursuant to those respective listings." A water polluted *only* by logging runoff or other nonpoint sources of pollution, like the

Garcia River, plaintiffs argue, should not be listed and no TMDL should be prepared. Plaintiffs base their arguments on the fact that effluent limitations—which apply only to point sources—are referenced in the listing requirement of Section 303(d) whereas no reference is made to nonpoint sources:

> Each state shall identify those waters within its boundaries for which the effluent limitations required by Section 301(b)(1)(A) and 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

All versions of plaintiffs' arguments must be rejected for four reasons.

First, the sole import of placing a river or water on a Section 303(d) list was that it would trigger the TMDL requirement. What use, then, did the statute contemplate for the TMDL? If the TMDL, for example, were to be used only to adjust NPDES effluent limitations for point sources, then plaintiffs' argument might have force. Such a narrower use, although a legitimate one, was not set forth in the statute as the sole use. Indeed, that use was not even expressly called out in the Act, although it was inferrable from Section 301(b)(1)(C), Section 302(a), and Section 303(d)(1)(C). The expressly contemplated use of TMDLs was their "incorporation" into the "continuing planning process" by the states under Section 303(e). That was the side of the equation, however, pertinent to nonpoint-source regulation (as well as to any state-administered NPDES program).[10] Moreover, the TMDLs had to be set at levels that

---

[10] The states are allowed but not required to adopt state-administered NPDES programs. In the absence of such a program approved by the EPA, the NPDES program within a state is administered by EPA itself. *See*

would "implement" the applicable water-quality standards. It would have been impossible to do so without taking any nonpoint sources into account as well as any point sources. It seems evident that TMDLs were intended, in part, to be used to help states evaluate and develop land-management practices to mitigate nonpoint-source pollution. Otherwise, as one court has stated, it would frustrate the "comprehensive approach" adopted in the 1972 Act. *Natural Resources Defense Council, Inc.* v. *Fox*, 909 F. Supp. 153, 156 (S.D.N.Y. 1995). In short, the statutorily-defined role of the TMDL is inconsistent with plaintiffs' argument.

Second, plaintiff's argument is inconsistent with the logic expressed in Section 303(d). Section 303 was entitled "Water Quality Standards And Implementation Plans." Water-quality standards were required for *all* navigable waters, intrastate or interstate. The first sentence of Section 303(d) required each state to "identify those waters within its boundaries" for which the new effluent limits would not be stringent enough to meet the standards. The starting point was, therefore, each and every substandard navigable water within the boundaries of the state. Then, only those redeemable through the imposition of state-of-the-art technology on point sources, the lead strategy under the Act, were expressly excused from the list. Since all rivers and waters regardless of pollution source were included in the universe for which water-quality standards were required, all of them—again regardless of source of pollution—were included in the universe for which listing and TMDLs were required—save and excluding only those for which effluent

---

Milwaukee v. *Illinois*, 451 U.S. 304, 311 (1981). Even today, after nearly thirty years, two states do not have approved NPDES programs.

limitations would be sufficient to achieve compliance with standards.[11]

Third, while it is true that nonpoint-source pollution was not mentioned in Section 303(d), the reason seems obvious. The 1972 Act superimposed the technology-driven mandate of point-source effluent limitations. To assess the impact of the new strategy on the monumental clean-up task facing the nation, Congress called for a list of the unfinished business expected to remain even after application of the new cleanup strategy. In calling for such a list, it was unnecessary to reference nonpoint pollution. Any polluted waterway— whether its sources were point, nonpoint or a combination—had to be listed if it would not be cleansed by the new approach. To have excluded the large number of rivers and waters polluted solely by agricultural and logging runoff would have left a chasm in the otherwise "comprehensive" statutory scheme. It would have crippled the continuing planning process by which the states were expressly required to confront nonpoint-source pollution and to incorporate TMDL data into their continuing planning process. To achieve the standards, an intermediate step was needed. That step required engineering data. That was the role of the TMDL. Similarly, to have limited TMDLs only to point-source loadings, as argued for by plaintiffs, would have left state agencies guessing at how to allocate the burden of cleanup between point and nonpoint contributions of the same pollutant.[12]

---

[11] This was subject to the further proviso that TMDLs only had to be set for those "pollutants" identified by EPA under Section 304(a)(2), 33 U.S.C. 1314(a)(2), as suitable for TMDL calculation, a subissue discussed in detail below.

[12] For these three reasons, the Court finds that Congress has directly spoken to the precise question at issue. There is, therefore, no need to resort to supplemental aids of construction. *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

Fourth, the Ninth Circuit has already gone on record that the TMDL process covers nonpoint as well as point sources, as set forth below. None of these decisions is four-square on point but some come close. Plaintiffs' argument is hard to reconcile with the Ninth Circuit's caselaw.

The Ninth Circuit Caselaw

Although the Ninth Circuit has not decided the precise issue raised, its Clean Water Act precedents support the conclusion reached above. The earliest-cited case to reach the Ninth Circuit involved a challenge by environmentalists to NPDES permits issued by EPA to Alaska gold-placer mines. The court held that EPA had erred in failing to require an effluent limitation for turbidity in the permit. The court distinguished between nonpoint-source pollution (no NPDES permit required) and point-source pollution (NPDES permit required), but held that water discharged through a sluice box was a point source. The EPA was required, therefore, to include in the permits whatever effluent limitations were necessary to achieve state water-quality standards (under Section 301(b)(1)(C)). *Trustees for Alaska* v. *EPA*, 749 F.2d 549, 557-58 (9th Cir. 1984).

In *Oregon Natural Resources Council* v. *United States Forest Serv.*, 834 F.2d 842 (9th Cir. 1987), the plaintiff organization argued that Section 301, which established effluent limitations for point sources, should incorporate limitations designed to achieve state standards for achieving elimination of nonpoint runoff. The Ninth Circuit rejected the attempt to confound the two separate ways in which the Act distinguished between point and nonpoint pollution:

> We recognize that nonpoint sources of pollution constitute a major source of pollution in the nation's waters [footnote omitted]. However, we do not believe that the Act allows for the enforcement of state water quality standards, as affected by nonpoint sources, under

> the citizen suit provision. When Congress established the National Pollutant Discharge Elimination System (NPDES) in 1972 and concomitantly created a new approach to regulating and abating water pollution, it drew a distinct line between point and nonpoint pollution sources. Point sources are subject to direct federal regulation and enforcement under the Act [footnote omitted]. *See* 33 U.S.C. § 1342. Nonpoint sources, because of their very nature, are not regulated under the NPDES. Instead, Congress addressed nonpoint sources of pollution in a separate portion of the Act which encourages states to develop areawide waste treatment management plans [footnote omitted]. *See* 33 U.S.C. § 1288 (emphasis added).

Oregon Natural Resources Council, 834 F.2d at 849. The court remanded, however, for a determination on whether the timber sale would cause nonpoint-source runoff in violation of the water-quality standards set by Oregon. In no way does the decision address the Section 303(d) list or TMDL features. But the decision does recognize that the 1972 Act comprehended nonpoint-source regulations through state areawide waste treatment management plans.

Of most immediate significance are the following two decisions. In *Alaska Center for the Environment* v. *Browner*, 20 F.3d 981 (9th Cir. 1994), the district court ordered EPA to issue TMDLs for Alaska waters, after a long period of inaction by the agency. EPA appealed only on grounds of plaintiffs' alleged lack of standing. The Ninth Circuit affirmed. EPA's standing argument involved the fact that even if TMDLs were issued, Alaska would have, at least in part, discretion "with respect to non-point source pollution." The Ninth Circuit responded:

> Here, by contrast, third party involvement does not render the relief sought completely speculative. Congress and the EPA have already determined that establishing TMDLs is

> an effective tool for achieving water quality standards in waters impacted by non-point source pollution.

Alaska Center, 20 F.3d at 985. Significantly, therefore, the Ninth Circuit went on record that the TMDL process covered nonpoint-source pollution. At the very least, this statement covered rivers and waters affected by both point sources and nonpoint sources. Nothing in the opinion so limited it, however, and the court's rationale seems equally applicable to rivers spoiled only by logging runoff.

In *Dioxin/Organochlorine Center* v. *Clarke*, 57 F.3d 1517 (9th Cir. 1995), the court of appeals upheld EPA's TMDL for dioxin, which had been set at the lowest level measurable by the current technology. The court of appeals described a TMDL as follows (*id.* at 1520):

> A TMDL defines the specified maximum amount of a pollutant which can be discharged or "loaded" into the waters at issue from all combined sources. Thus a TMDL represents the cumulative total of all "load allocations" which are in turn best estimates of the discrete loading attributed to nonpoint sources, natural background sources, and individual wasteload allocations ("WLAs"), that is, specific portions of the total load allocated to individual point sources. When a TMDL and specific wasteload allocations for point sources have been established, any NPDES permits issued to a point source must be consistent with the terms of the TMDL and WLA. See 40 C.F.R. § 130.2.

This decision also treated TMDLs as applicable to nonpoint sources. The court then went on to hold that Section 303(d) did not require development and proven failure of best available technology before setting a TMDL for a toxic pollutant. *Id.* at 1528.

In summary, the Ninth Circuit has already stated that TMDLs are an "effective tool for achieving water quality standards in waters impacted by non-point source pollution" (*Alaska Center*) and that "[a] TMDL defines the specified maximum amount of a pollutant which can be discharged or 'loaded' into the waters at issue from all combined sources" (*Dioxin*). In the face of these statements, it would be difficult for a district court within the Ninth Circuit to hold that TMDLs were not required for listed rivers and waters harmed only by nonpoint pollution.[13]

The Legislative History

Section 303(d) originated in the House of Representatives. The House committee report, on which plaintiffs base their legislative-history argument, stated:

> Water quality standards will be utilized for the purpose of setting effluent limitations in those cases where effluent limitations for point sources would not be consistent with such standards. Even though all point sources must be January 1, 1976, as a minimum, meet the requirements of subsection (b)(1)(A) and subsection (b)(1)(B) of section 301 *all point sources could be required to meet a more stringent effluent limitation consistent with water quality standards of the receiving waters if the effluent*

---

[13] In *Natural Resources Defense Council* v. *EPA*, 915 F.2d 1314 (9th Cir. 1990), the Ninth Circuit held under a 1977 Amendment, that EPA regulations had to include a requirement that the states identify all sources discharging any pollutant believed to be impairing water quality into a listed river or water. The decision explained the broad outline of the 1972 Act and stated that the fact that only point-source pollution was directly regulated but otherwise did not address the immediate issue. *Oregon Natural Desert Ass'n* v. *Dombeck*, 172 F.3d 1092 (9th Cir. 1998), held that a grazing permit issued by the United States Forest Service did not require prior state certification of compliance with state water-quality standards, holding that such certifications were required only for "discharges," which referred only to point sources. 172 F.3d at 1095.

limitations set pursuant to subjection (b)(1)(A) and subsection (b)(1)(B) of section 301 are inadequate to meet those water quality standards. In this case a more stringent effluent limitation will be imposed.

Any required more stringent effluent limitations will be set on the basis of that reduction in the quantity and quality of the discharge of pollutants which would be required to make the total discharge load in the receiving waters from *municipal and industrial* sources consistent with water quality standards. This should not be interpreted to mean that such more stringent industrial and municipal effluent limitations will, in themselves, bring about a meeting of water quality standards for receiving waters. The Committee clearly recognize that non-point sources of pollution are a major contribution to water quality problems.

The Committee heard extensive testimony during the oversight and legislative hearings to the effect that it is extremely difficult to apportion the discharge load from all *point sources* along a waterway or section of a waterway. However, testimony was also heard from the more experienced States that they already have this capability. The Committee feels that with appropriate support from the Administrator, the required analysis can be completed by the State in a timely fashion.

H.R. Rep. No. 92-911, at 105-06 (1972) (emphasis added).

From this, plaintiffs conclude that while Congress understood the role of nonpoint sources to be a "major contribution" to water-quality problems, it elected to regulate only point sources through Section 303(d) and described load calculations only as a predicate step in adjusting effluent limits.

To be sure, the focus of the passage was on effluent limitations and their adjustment to meet water-quality

standards. Nothing in this passage, however, expressly limited the role of water-quality standards or load calculations to this single purpose. The passage also recognized that "non-point sources of pollution are a major contribution to water quality problems." The passage also seemed, therefore, to recognize that mitigation of nonpoint-source pollution would also be required to meet standards. In conference, moreover, Section 303(d)(1)(C) was amended to amplify the TMDL text, although not directly as to the specific issue presented. The conference report then stated:

> (1) Subsection (d)(1) requires each State to identify the waters within its boundaries for which effluent limitations required to section 301 are not stringent enough to implement a water quality standard applicable to the waters. The State is to establish a priority ranking for such waters, taking into account the severity of the pollution and uses to be made of the water.
>
> * * *
>
> (3) Each State is to establish for waters identified under paragraph (1)(A) in accordance with the priority ranking the total maximum daily load for those pollutants which the Administrator identifies as suitable for such calculation. This is to be established at a level necessary to implement water quality standards with seasonal variations and a margin of safety.
>
> * * *
>
> (5) The State is to submit to the Administrator from time to time the waters so identified and loads so established. The Administrator is to approve or disapprove the identification and load within 30 days after submission. If they are approved, the State must incorporate them into its plan under subsection (e). If he disapproves them, he is

> required to identify the waters and establish the loads, and the State is to incorporate that into its current plan.
>
> * * *
>
> (7) Each State is required to have a continuing planning process consistent with this Act and to submit such plan within 100 days after the date of enactment of this Act to the Administrator for his approval. The Administrator must approve or disapprove such process within 30 days after submission, and he must, from time to time, review the State's approved planning process to insure that it is at all times consistent with the Act.
>
> * * *
>
> (9) The planning process must include a process which will result in plans for all navigable waters within the State which include, among other things, total maximum daily loads for pollutants and thermal discharges.

The conference report followed the construction of the Act adopted by this Court, a construction that would, removing only those waters redeemed by the effluent limitations, result in a plan and TMDL for every substandard navigable water within a state.[14]

The Definition of Pollutant

For this Court, the more troubling issue is one not raised by plaintiffs but one raised by EPA in a footnote (Def. Br. 25 n. 24) and on which the Court requested argument. It concerns the statutory definition of "pollutant." TMDLs were made obligatory, as stated, only for "those pollutants which the

---

[14] The earlier Senate report stated, "[i]t has become clearly established that the waters of the Nation cannot be restored and their quality maintained unless the very complex and difficult problem of nonpoint sources is addressed." S. Rep. No. 92-414, 92nd Cong., 1st Sess. 39 (1971).

Administrator identifies under Section 304(a)(2) as suitable for such calculation." In turn, the latter provision called for EPA to consult with state and federal agencies and to develop and publish an identification of pollutants suitable for TMDL measurement correlated with the achievement of water-quality objectives. After enactment, EPA identified "all" pollutants as suitable. 43 Fed. Reg. 60662 (Dec. 28, 1978).

But what is a "pollutant"? "Pollutant" was defined in Section 502 as meaning "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste *discharged into water*" (emphasis added). Two issues arise. *First*, the statutory definition did not include the word "sediment." To that, there is a dispositive answer. The Ninth Circuit has already held that "sediment" and natural material from the "bank alongside" a river is a pollutant (in the context of a placer-mining point source). *Rybachek* v. *EPA*, 904 F.2d 1276, 1285-86 (9th Cir. 1990); *accord*: *Idaho Conservation League* v. *Thomas*, 91 F.3d 1345, 1347 (9th Cir. 1996) (TMDL prepared for sediment); *Driscoll* v. *Adams*, 181 F.3d 1285, 1291 (11th Cir. 1999) (sediment is a pollutant); *see also United States* v. *M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1505-06 (11th Cir. 1985) (dredged spoil includes vegetation and sediment); *Hudson River Fishermen's Ass'n* v. *Arcuri*, 862 F. Supp. 73, 76 (S.D.N.Y. 1994) (pollutants include rock, sand and dirt). Moreover, the legislative history referred to "sediment" as a "pollutant," stating "sediment, often associated with agricultural activities, is by volume our major pollutant . . . ." S. Rep. No. 92-414, 92d Cong. 1st Sess. 52 (1971). This statement appears, incidentally, in the same report briefly explaining that the definition of pollutant was borrowed from the Refuse Act. *Id.* at 76.

Second, and more troubling, the italicized phrase above—"*discharged into water*"—was part of the statutory

definition of pollutant. "Discharges" are uniquely associated with point sources under Section 502(12). *Oregon Natural Desert Ass'n* v. *Dombeck*, 172 F.3d 1092, 1095 (9th Cir. 1998). One might wonder, therefore, whether the entire list of statutory pollutants was confined to point sources. If so, then TMDLs were authorized only for point-source pollutants (as would be other features of the Act). Preliminarily, however, the statutory definition is ambiguous for it reads "dredged spoil . . . rock, sand, cellar dirt *and* industrial, municipal and agricultural waste discharged into water." The phrase "discharged into water" might have been intended to modify only the tag-end phrase "and industrial municipal and agricultural waste." Alternatively, it might have been intended to modify the entire list. To add confusion, the statutory definition of "discharge" in Section 502(12) itself incorporated the term "pollutant," thus injecting a circularity problem.

Significantly, the Act otherwise referred to "nonpoint sources" of "pollutants," including from "agricultural and silvicultural activities, including runoff from fields and crop and forest lands." *E.g.*, §§ 105(d), 304(e), *see also* 305(b)(1)(E). The operative language of the Act, therefore, expressly treated pollutants as emanating from nonpoint sources. That usage was broader than and inconsistent with a narrow image of pollutants only flowing out of a pipe. Similarly, Section 201(d)(2) called for construction of facilities providing for, among other things, "the confined and contained disposal of pollutants not recycled." If pollutants had to be discharged into water, they could not also be confined and contained. These provisions make reasonably clear that pollutants could derive from any source, not merely from point sources. So too with the legislative history. While the background of the definitions is unilluminating, the legislative history otherwise referred to nonpoint-source "sediment" as a "pollutant," as quoted above. *See* H.R.Rep. No. 92-911, 92nd Cong., 2nd Sess. 102 (1972); S. Rep. No. 92-414, 92nd Cong., 1st Sess. 10, 13, 52, 68

(1971); S.Rep. No. 92-1236, 92nd Cong., 2nd Sess. 126 (1972). To confine pollutants to point sources, finally, would impair the "comprehensive" fabric of the Act. Any residual doubt on this score is eliminated by deference to the reasonable construction adopted by the agency charged with enforcement of the Act. *Chevron*, 467 U.S. at 865. Therefore, the Court holds that "pollutant," as used in the Act, includes sediment, regardless of whether it comes from a point source or a nonpoint source.

The 1987 Amendment and Section 319

In 1987, Congress amended Section 319 to the Clean Water Act. It was specifically directed to nonpoint-source management programs. 33 U.S.C. § 1329; 112 Stat. 3283. This enactment, plaintiffs urge, would have been unnecessary and superfluous if Section 303(d) already comprehended nonpoint sources. In brief, Section 319(a)(1) required each governor to submit to EPA a report that identifies:

> Those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards . . . .

The report was to identify categories and subcategories of nonpoint sources, the state's process for identifying best management practices, the state's measures to control each such category and subcategory, and the state and local programs for controlling pollution from nonpoint sources. Section 319(b) also required each state to submit a "management program" for controlling nonpoint-source pollution, including an identification of the best management practices which will be undertaken to reduce "pollutant loadings" resulting from each category and subcategory. Plaintiffs are correct that the 1987 amendment covered some of the same general ground that EPA contends was already enacted. Nonetheless, plaintiffs' argument is rejected for three reasons:

First, while Section 319 addressed nonpoint pollution, it did not conflict with or duplicate the Listing/TMDL provisions at issue. The Section 303(d) list called for all unfinished business after application of technology-driven effluent limitations. Section 319, however, sought instead to list those rivers and waters which could not achieve standards "without additional action to control nonpoint sources of pollution." The two lists would partially overlap, to be sure, but were not the same. A river ruined only or mainly by industrial waste might make the Section 303(d) list—but only that list—if the best available technology would be insufficient to meet state standards and any cleanup of nonpoint contaminants would make no material difference. In contrast, a remote river muddied by excessive logging might make both lists. Moreover, Section 319 was silent as to TMDLs whereas Section 303(d) required them. Section 303(d), therefore, supplied an important ingredient for the reports and plans under the 1972 Act as well as those later required under Section 319. Just as the TMDLs were input for the area-wide management plans under Section 208 and continuing planning process establish under Section 303(e), the TMDLs were needed for the planning required under Section 319. Finally, Section 310 authorizes federal grants to the states for nonpoint-source management programs, a new and additional feature to combat a continuing problem.

Second, while the 1987 enactment adopted newer and stronger measures to address the problem of nonpoint pollution, the 1972 enactment plainly spelled out—expressly so—medicine of its own. The phrase "nonpoint sources of pollution" was prominent in the 1972 Act (see Sections 201(c), 208(b)(2)(F), 304(e), 305(b)(1)(E)), as set forth above. It is inaccurate to argue, as do plaintiffs, that nonpoint-source pollution escaped attention under the 1972 Act.

Third, the Ninth Circuit has rejected a similar attempt to infer congressional intent for the 1972 Act from a later Clean Water Act amendment (in that case from the 1977 amendment):

> This legislative history does not persuade us, because it is not part of the law, was written long after the law was passed, and seems inconsistent with the law passed when it was written. This is 1977 "history" about a 1972 law. Instead of giving us a window into the thinking of the legislators who wrote the bill, it gives us the advice of someone on a House Conference Committee staff five years after section 1369 was promulgated about how we should construe a law passed by an earlier Congress under a different president in a different political era. Subsequent legislative history in the form of committee reports of subsequent congresses are generally considered an "extremely hazardous basis for inferring the meaning of a congressional enactment." *Consumer Product Safety Comm.* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 fn. 13 (1980).

Longview Fibre Co. v. *Rasmussen*, 980 F.2d 1307, 1311-12 (9th Cir. 1992). So too here.

* * *

It is true, as plaintiffs note, that several members of Congress stated that the 1987 amendment would be "a first step" or would "begin" the process of addressing this source of water degradation (see Pl. Br. 21). One must, however, remember the context. After 1972, EPA was exceedingly slow, even resistant to, the water-quality approach.[15] Following the 1972 amendments, EPA was preoccupied in promulgating the technology standards required for point-source regulation. At least in the upper chamber, Senator Edmund Muskie, a champion of the technology approach, had urged EPA to give it top priority and relegate the standards approach to "secondary

---

[15] The history is documented in Houck, *TMDLs. Are We There Yet?: The Long Road Toward Water Quality-Based Regulation Under the Clean Water Act*, 27 ELR 10391 (1997).

priority." Senate Report of Committee of Conference on S. 2770 in Lib. Of Cong., *A Leg. Hist. Of the Water Pollution Control Act Amendment of 1972*, 93d Cong. 1st Sess. 171 (1973). In that spirit, EPA did virtually nothing under Section 303(d) for six years.[16]

Then, in 1978, EPA was ordered to publish a final identification of pollutants, a preliminary step under Section 303(d) necessary before any state had to prepare a TMDL. *Board of County Commrs.* v. *Costle*, No. 78-0572, slip op. (D.D.C. June 20, 1978) (unpublished order); see 43 Fed.Reg. 42303 (Sept. 20, 1978). EPA stated that it had not considered such finalization "as a matter of high priority" because the "practical results" of TMDLs were already being accomplished, it felt, through basin planning. *Id.* at 42303. The final identification was published on December 28, 1978. It did not identify any pollutants by name but instead simply identified "all pollutants, under proper technical conditions, as being suitable for the calculation of total maximum daily loads." The phrase "proper technical conditions" was defined to mean "the availability of analytical methods, modeling techniques and database necessary to develop a technology defensible TMDL." Such availability, the EPA said, would have to be determined on a case-by-case basis. *Id.* at 60662. EPA then asked each state merely to identify "one or more" water-quality limited stream segments within 180 days, leaving it to the future as to when more than one would be due. *Id.* at 60666.

The states were also slow to respond. Most states submitted no lists under Section 303(d), although Nevada submitted a list in 1979 for the Walker River, a river polluted only by nonpoint sources. EPA then took the position that until a state submitted a TMDL, EPA had nothing to approve or disapprove. Houck,

---

[16] Under Section 303(e), EPA first published a water-quality standards regulations in 1975. 40 C.F.R. § 130.7; 40 Fed. Reg. 55334 (Nov. 28, 1975).

27 ELR at 10393. Eventually, the Seventh Circuit held that the prolonged failure of a state to submit anything was a "constructive submission" of no TMDL at all, triggering EPA's duty to act. Doing nothing was, the court held, tantamount to approval of a "constructive submission." *Scott* v. *City of Hammond*, 530 F. Supp. 288 (N.D. Ill. 1981), *aff'd in part, rev'd in part*, 741 F.2d 992, 996 (7th Cir. 1984). Another suit in Oregon led to a consent decree in 1987 with a timetable for EPA to act if Oregon did not submit a list of substandard waters. *Northwest Environmental Defense Center* v. *Thomas*, No. 86-1578 BU (D. Or. June 3, 1987). In 1991, Judge Rothstein in Seattle held that EPA had flagrantly violated the Act by failing to implement the TMDL requirements for Alaska. Based on Alaska's "constructive submission" of no TMDLs at all, EPA was required to initiate its own process for promulgating TMDLs for that state. The Ninth Circuit affirmed. *Alaska Center for the Environment* v. *Reilly*, 762 F. Supp. 1422, 1429 (W.D. Wash. 1991), *aff'd*, 20 F.3d 981 (9th Cir. 1994). A series of other TMDL lawsuits against EPA were filed in Washington, Idaho, Georgia, New York. Houck, 27 ELR at 10395-96 (summarizing results). That EPA had virtually no TMDL program at all was the conclusion of a 1989 report on the TMDL process by the United States General Accounting. GAO, *Water Pollution: More EPA Action Needed to Improve the Quality of Heavily Polluted Waters, GAO Report to the Chairman: Subcommittee on Regulation and Business Opportunities Committee on Small Business, House of Representatives* (Jan.1989).

In April 1991, finally, EPA began to warm to the TMDL process and published its first guidelines for state implementation of Section 303(d) (EPA Tab 16). EPA set October 1992 as a deadline for submission of the lists of substandard rivers and waters. Houck, 27 ELR at 10395. It was

into this renaissance of Section 303(d)—twenty years after its passage—that the Pronsolinos were drawn.[17]

In light of this history, it is no wonder that some elected representatives regarded the 1987 amendment as a "first step" toward controlling nonpoint-source pollution. The Court is convinced, however, that the first step was plainly authorized in 1972—only to be little noticed due to other cleanup priorities until a generation later.

Grants Versus Regulation

The word "regulate" pervades plaintiffs' argument. Congress did not, they say, authorize EPA to regulate state land-use practices. The Court agrees. EPA agrees. Unlike EPA's

---

[17] Although EPA was exceedingly slow to implement the TMDL requirements, EPA has not taken a position in conflict with its construction urged in this case. To the contrary, EPA's first description of the TMDL process in its revised Water Quality Planning & Management Regulations is fully consistent. 40 C.F.R. Parts 35 and 130 and 50 Fed. Reg. 1774-75 (Jan. 11, 1985). At oral argument, plaintiffs cited a recent Supreme Court decision concerning a government agency's regulatory authority. In *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000), the Court held the FDA had no authority to regulate tobacco products under the Food, Drug and Cosmetic Act. Congress had enacted six separate pieces of legislation addressing the problem of tobacco use and human health. *Id.* at 1306. In adopting each statute, Congress had "acted against the backdrop of the FDA's consistent and repeated statements that it lacked authority under FDCA to regulate tobacco absent claims of therapeutic benefit by the manufacturer." Congress had considered, and rejected, legislation that would have given the FDA such authority. It is evident, under these circumstances, that the statutes enacted by Congress "effectively ratified the FDA's long-held position that it lacks jurisdiction to regulate tobacco products." *Ibid.* The Court concluded that Congress did not give the FDA the authority it now sought to regulate tobacco products. Here, on the other hand, EPA had never made any statements to Congress expressing a lack of authority to issue a TMDL for waters polluted by nonpoint sources. Furthermore, EPA has not been inconsistent in its position concerning TMDLs for nonpoint-source polluted waters.

authority to revise individual NPDES permits issued by states for individual point sources, EPA received no authority to review land-use restrictions placed (or not placed) on timber-harvesting permits by CDF or any other practice permitted for agriculture or silviculture. The 1972 Act was clear that states should finally decide whether, and to what extent, land-management practices should be adopted to mitigate runoff. To assist the states in gathering information, the statutory role of the TMDL was to identify the load necessary, as a matter of engineering, to implement the water-quality standards. Without such engineering data, states would be left to guess what needs to be done to meet those standards.

Under the Act, California must "incorporate" the TMDL in its planning. Nothing, however, requires that the TMDL be uncritically and mechanically passed through to every relevant parcel of land. California is free to select whatever, if any, land-management practices it feels will achieve the load reductions called for by the TMDL. California is also free to moderate or to modify the TMDL reductions, or even refuse to implement them, in light of countervailing state interests. Although such steps might provoke EPA to withhold federal environmental grant money, California is free to run the risk.

A practical reality, of course, is that once federal environmental grant money begins to flow, state regulatory agencies become dependent on it. They become sensitive to threats to terminate it—terminations that would entail job and programmatic cuts. This influences behavior. A state may knuckle under to coercive threats by EPA. A state may uncritically apply TMDL-loading reductions, like the ones at issue, without regard to other legitimate state interests or to the unique circumstances of an applicant. Even so, this is not direct federal regulation. The regulation is by California—though influenced by incentives established by Congress and the agency charged with protecting the environment. *Cf.*, *North*

Carolina Dept. of Transportation v. *Crest Street Community Council*, 479 U.S. 6, 8 (1986).

Landowners like the Pronsolinos have avenues of redress. They can appeal unreasonable or unauthorized restrictions within the state administrative system. Aggrieved landowners in a river basin might collectively or singly challenge a TMDL by EPA or a Section 303(d) listing under the Administrative Procedure Act as "arbitrary" or "capricious," or "unsupported by substantial evidence," or an "abuse of discretion." 5 U.S.C. §§ 702, 706. Landowners, for example, might try to show that EPA's engineering is manifestly wrong. No such claim, however, is made here. The only claim is that the Garcia River should never have been listed in the first place and that no TMDL at all was ever authorized, a claim that must be rejected for the reasons stated.

CONCLUSION

In summary, the Clean Water Act called for a comprehensive set of water-quality standards for every navigable river and water in America. For every substandard navigable river or water, Congress sought a determination whether the central innovation of the 1972 Act—technology-driven limits on effluent— would be sufficient to achieve compliance. If not, the river or water was required to go on a list of unfinished business and a TMDL calculation was required. The TMDL was to quantify the load improvements necessary to meet standards. If EPA disagreed with a state's list or any TMDL as inconsistent with the purposes of the Act, then EPA was required to revise the list or the TMDL. No substandard river or water was immune by reason of its sources of pollution. The process was made just as mandatory for wild but ruined rivers as it was for urban-blighted waters.

Once the TMDLs were prepared, they were intended to be applied to point and nonpoint sources differently. As to point

sources, the TMDLs were to be taken into account in further restricting effluent, under NPDES permits, as authorized by Section 301(b)(1)(C). As to nonpoint sources of pollution, the TMDLs were to be incorporated into the continuing planning processes of the states. This conferred a large degree of discretion on the states in how and to what extent to implement the TMDLs for nonpoint sources. A state could even refuse to implement a TMDL, eschewing best management practices if it wished, although to do so might provoke EPA to curtail or to deny grant money to the state. But as to whether TMDLs were authorized in the first place for all substandard rivers and waters, there is no doubt. They plainly were and remain so today—without regard to the sources of pollution.

This resolves the issue raised over the power of EPA to list waters like the Garcia River or to issue TMDLs for such waters. The complaint raised no question whether the specific listing or specific TMDL was otherwise unlawful. The complaint did not, for example, challenge the specifics of the TMDL as arbitrary or capricious. The case now having been fully resolved on cross-motions for summary judgment, JUDGMENT shall be entered for defendants. The Clerk shall then close the file.

Dated: March 30, 2000

/s/
William Alsup
United States District Judge

APPENDIX D

STATUTORY ADDENDUM

Section 303(d) of Public Law 92-500, 86 Stat. 816 (1972)

(d)(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301 (b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 301 are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a

balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 304(a)(2)(D), for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days afer the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this

subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

(2)

Supreme Court, U.S.
FILED
MAR 5 2003
CLERK

No. 02-1186

IN THE
Supreme Court of the United States

GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO, AS TRUSTEES FOR GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO TRUST, *ET AL.*,

Petitioners,

v.

WAYNE NASTRI, REGIONAL ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 9, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONSE IN SUPPORT OF PETITION

Of Counsel:
WILLIAM R. MURRAY
AMERICAN FOREST & PAPER ASSOCIATION
1111 19th Street, NW
Suite 400
Washington, DC 20036
(202) 463-2782

STEVEN P. QUARLES
Counsel of Record
ELLEN B. STEEN
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
(202) 624-2500

Attorneys for American Forest & Paper Association and California Forestry Association

10 pp

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption of the petition, the American Forest & Paper Association ("AF&PA") and the California Forestry Association ("CFA") participated in the case below as plaintiff/appellant-intervenors. Fifteen groups participated as defendant/appellee-intervenors. Those groups are: Pacific Coast Federation of Fishermen's Associations, Golden Gate Fishermen's Association, Sierra Club, Environmental Protection Information Center, Coast Action Group, Friends of the Garcia, California Trout, Klamath Forest Alliance, Mendocino Environmental Center, Willits Environmental Center, California Wilderness Coalition, Friends of the Navarro River, South Fork Mountain Defense Committee, Northcoast Environmental Center, and San Francisco Baykeeper.

RULE 29.6 STATEMENT

AF&PA and CFA are corporate parties. Neither has a parent corporation or stock owned by a publicly traded company.

TABLE OF CONTENTS

PARTIES TO THE PROCEEDING i

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iv

REASONS FOR GRANTING THE PETITION 1

I. Federally Approved or Established Nonpoint Source TMDLs Unlawfully Constrain State Programs. 2

A. Federal TMDLs Are Binding on State Water Quality Planning Programs. 2

B. Congress Has Specifically Denied EPA the Authority to Dictate the Content of State Nonpoint Source Programs. 5

II. Prescriptive Requirements for Federal Nonpoint Source TMDLs Drain Funding and Other Resources from the State-Controlled Programs That Were Intended to Govern Nonpoint Source Control. 8

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 7

Sierra Club v. Hankinson, 939 F. Supp. 872 (N.D. Ga. 1996) 3

STATUTES

Clean Water Act, 33 U.S.C. §§ 1251-1387 ..... passim

§ 208, 33 U.S.C. § 1288 ..... 5, 6, 8

§ 303(d), 33 U.S.C. § 1313(d) ..... passim

§ 319, 33 U.S.C. § 1329 ..... passim

OTHER AUTHORITIES

EPA, *Nonpoint Source Program and Grants Guidance for Fiscal Year 1997 and Future Years* (May 1996) 10

EPA, *Supplemental Guidelines for the Award of Section 319 Nonpoint Source Grants in FY 2001* (Nov. 21, 2000) 9

EPA, *Supplemental Guidelines for the Award of Section 319 Nonpoint Source Grants to States and Territories in FY 2003* (Aug. 26, 2002). 9

REGULATIONS

40 C.F.R. § 130.2(g) 4

40 C.F.R. § 130.2(i) 4

40 C.F.R. § 130.7(d) 5

REASONS FOR GRANTING THE PETITION

AF&PA and CFA agree with the reasons for granting the petition as articulated by the petitioners. We offer the following grounds in further support of the petition.

This case presents a question of critical importance for two major programs established under two sections of the Clean Water Act ("CWA"): the § 303(d) total maximum daily load ("TMDL") program directly at issue and the § 319 program, which requires State-based initiatives to reduce pollution from so-called "nonpoint sources" that are not subject to CWA permitting. In a very real sense, the Court's resolution of this case (or its decision not to resolve the questions presented) will determine for years to come whether land use controls to reduce nonpoint source pollution are imposed according to the will of the States or the will of the United States Environmental Protection Agency ("EPA" or "the agency").

Congress has plainly sought throughout the history of the modern CWA to reserve this power to the States rather than cede it to the federal government. Yet EPA's interpretation of its TMDL authority, to which the courts below wrongly deferred, usurps the States' role and dramatically strengthens EPA's hand in directing land use policy and the stringency of land use restrictions nationwide. Moreover, the nonpoint source TMDL obligations imposed by EPA consume millions of dollars every year that would otherwise be available to develop and implement on-the-ground pollution controls through the flexible programs that Congress established for that purpose. Thus, as further explained below, leaving the Ninth Circuit's decision in place would upset the CWA's balance of federal and State power, impose tremendous economic burdens on States and

landowners, and actually undermine the effective and efficient control of nonpoint source pollution.

I. Federally Approved or Established Nonpoint Source TMDLs Unlawfully Constrain State Programs.

A. Federal TMDLs Are Binding on State Water Quality Planning Programs.

The court below correctly recognized that TMDLs themselves establish no *directly enforceable* limit on pollutant loading from any source. *See* 291 F.3d 1123, 1140 (9th Cir. 2002). The court improperly rejected the Pronsolinos' federalism arguments, however, based on its gross misapprehension of the binding and prescriptive nature of TMDLs that are established pursuant to CWA § 303(d)(1)-(2), 33 U.S.C. § 1313(d)(1)-(2). As the Pronsolinos point out (Petition at 4), EPA's arm-twisting left no alternative for California regulators but to translate the loading limits for the Garcia River into restrictions on timber harvesting and other forestry activities. Moreover, as explained below, such federal TMDLs as a practical matter are always binding on State water quality programs.

For waters identified pursuant to CWA § 303(d)(1), States must submit TMDLs for EPA approval and, in the event of disapproval, EPA must be directly establish the TMDLs. 33 U.S.C. § 1313(d)(2). Where such "federal" TMDLs are not required – *i.e.* for all waters *not* listed pursuant to § 303(d)(1) – the CWA requires States to "estimate" TMDLs, for informational purposes, without the need for EPA "approval." *Id.* § 1313(d)(3).

Pursuant to CWA § 303(d)(2) and (e), all EPA-approved or EPA-established TMDLs must be incorporated into State "plans" for the waters at issue pursuant to the State's "continuing planning process" ("CPP"). 33 U.S.C. § 1313(d)(2) (upon EPA approval of TMDLs, or upon EPA establishment of TMDLs, State "shall incorporate them into its current plan under subsection (e) of this section"); *id.* § 1313(e) (identifying requirements for State CPPs). EPA must periodically review each State's CPP, and States must have an EPA-approved CPP to be authorized to administer the CWA permitting program for point source dischargers within their boundaries. *Id.* § 1313(e)(2).

Because federal TMDLs must be incorporated into State water quality plans – and because federal TMDLs can be modified only with further EPA review and approval – such TMDLs necessarily constrain subsequent State and local efforts to address nonpoint source pollution. *See Sierra Club v. Hankinson*, 939 F. Supp. 872, 874 (N.D. Ga. 1996) (ordering EPA to implement federally approved or established TMDLs within Georgia by reviewing and requiring "revision, modification, revocation or reissuance as necessary of Georgia's Water Quality Management Plans, ... Continuing Planning Process, ... and any Memoranda of Agreement between EPA and the State of Georgia on water quality issues") (citations omitted). These binding and inflexible targets contrast sharply with *estimated TMDLs* generated pursuant to CWA § 303(d)(3) "*for the specific purpose of developing information.*" 33 U.S.C. § 1313(d)(3) (emphasis added). Estimated TMDLs also are used in State planning, *see id.* § 1313(e)(3)(C), but for informational purposes only and with no federal "approval." Such estimated TMDLs therefore serve to inform State water quality decisions but can be modified by the State alone to account for new information, changes in the sources of

pollution over time, or evolving water quality programs and policies.

The establishment of federal TMDLs thus effectively binds the State to strive toward implementation of those particular loading limits unless and until EPA approves of different limits. Even where federal TMDLs are established for waters affected only by *nonpoint source* activities, these nonpoint source TMDLs become binding targets to be pursued by State authorities notwithstanding that the State may have had no role in their development. The State must seek to achieve such federal TMDL targets even if they contradict the State's own land use policies and nonpoint source control programs, such as previously established programs and plans developed pursuant to CWA § 319 (discussed *infra*). Any State efforts to modify federal nonpoint source TMDLs for consistency with the State's own water quality programs, conservation efforts, and land use policies may proceed only with EPA "approval" of a revised TMDL.

According to EPA, States are bound to pursue not only the *total* pollutant loading reduction mandated under a federal TMDL, but also a federally approved *allocation* of pollutant loading among sources. EPA's implementing regulations define "total maximum daily load" as the sum of "wasteload allocations" to point source dischargers and "load allocations" to nonpoint source activities and natural background. *See* 40 C.F.R. § 130.2(i) (definition of TMDL); *id.* § 130.2(g) (defining "load allocation" as "the portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources"). According to the agency, EPA's approval authority – and its authority to directly establish TMDLs – extends to the establishment of these

"load allocations" among land use activities within a watershed. *See id.* § 130.7(d) (stating that all wasteload allocations, load allocations, and TMDLs established for § 303(d)(1)-listed waters must be submitted for EPA review and approval).

Such binding federally approved TMDLs, and even federally approved "allocations" among sources, may be appropriate in the context of defining load reductions to be required of federally regulated point source dischargers. As discussed below, however, this degree of EPA control fundamentally contradicts the limited federal authority established by Congress with respect to State *nonpoint source* control strategies. Instead, where nonpoint sources cause or substantially contribute to water quality impairment, Congress has specifically crafted CWA provisions to maximize State flexibility – providing federal financial assistance and technical guidance to support, but never to prescribe, State programs.

B. Congress Has Specifically Denied EPA the Authority to Dictate the Content of State Nonpoint Source Programs.

Congress defined the appropriate State and federal roles and responsibilities with respect to nonpoint source pollution control in two CWA provisions. The first provision, § 208, was enacted along with the TMDL provisions in 1972. *See* 33 U.S.C. § 1288. The second, § 319, was enacted 15 years later in 1987. *See id.* § 1329. The limited authority Congress accorded to EPA under both provisions stands in vivid contrast to the power asserted by EPA to directly establish maximum pollutant loads for nonpoint source land use activities.

In CWA § 208, the same Congress that authorized TMDLs established an extremely limited EPA role in addressing nonpoint source control. Section 208 required that State-designated organizations establish, and submit to EPA, "areawide waste treatment management plans" that would include a process to: (1) "identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution," and (2) "set forth procedures and methods (including land use requirements) to control to the extent feasible such sources." 33 U.S.C. § 1288(b)(2)(F). Although § 208 authorized EPA review and approval of the specified State *process*, it did not authorize EPA review of *substantive* pollution reduction goals and control methods that would ultimately be identified. Nor did § 208 establish any mechanism – such as direct EPA action – to ensure that appropriate plans and processes would be established. Instead, Congress provided incentives for State-based initiatives through authorized federal funding. *See id.* § 1288(f).

The enactment of CWA § 319 in 1987 introduced a more aggressive approach to nonpoint sources. Yet even with this provision, Congress stopped far short of authorizing EPA to *directly prescribe* the substance of State nonpoint source control plans. Section 319 required States to submit "assessment reports": (1) listing waters in need of additional nonpoint source control, (2) identifying sources or categories of sources responsible for significant pollution in those waters, (3) describing "the process … for identifying best management practices and measures … to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source," and (4) describing the State and local programs for controlling nonpoint source pollution. 33 U.S.C. § 1329(a)(1). Section 319 also required the submittal of State "management

programs" that: (1) identify the best management practices to be undertaken to reduce pollution from the identified nonpoint sources, (2) identify the regulatory or nonregulatory programs to achieve implementation of those practices, and (3) provide a schedule for implementation of the program and the practices at the "earliest practicable date." *Id.* § 1329(b)(2).

Section 319 authorizes EPA to "disapprove" State assessment reports and management programs that do not meet the statutory requirements, so long as EPA does so within 180 days. *See* 33 U.S.C. § 1329(d)(1) (report or program deemed approved, unless expressly disapproved within 180 days). EPA disapproval of a *management program* (*i.e.*, the submittal that identifies nonpoint source controls) also requires notice and a three-month period for the State to submit a revised program for approval. *Id.* § 1329(d)(2). Most importantly, even if a State nonpoint source management program is "disapproved," § 319 provides no authority for EPA to directly establish a federal program and impose it on the State. Instead, in the absence of an approved *State* program, § 319 authorizes *local* public agencies or organizations to develop and submit an approvable program. *Id.* § 1329(e).

Congress's clear, consistent, and long-standing determination *not* to allow EPA to dictate nonpoint source control standards cannot be reconciled with the lower court's interpretation of § 303(d). *Compare Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160-61 (2000) (finding it "clear, based on the [Federal Food, Drug and Cosmetic Act's] overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products"). To the contrary, the CWA as a

whole unambiguously denies EPA the power to directly establish maximum pollutant loads for nonpoint source activities.

Sections 208 and 319 also cannot be squared with mandatory federal nonpoint source TMDLs that must be set at levels "necessary to implement ... water quality standards" *regardless of cost.* Although TMDLs must be established "at a level necessary to implement the applicable water quality standards," 33 U.S.C. § 1313(d)(1)(C), the nonpoint source statutory provisions call for pollution reduction only to the extent "feasible" (in § 208) or "practicable" (in § 319), *id.* §§ 1288(b)(2)(F), 1329(a)(1)(C). These flexible, pragmatic goals allow for due consideration of the potential burdens that land use restrictions may impose on small businesses, individuals, and local governments. The explicit provision for such considerations in both § 208 and § 319 demonstrates Congress's determination *not* to ask that States impose nonpoint source controls without regard to cost or technical feasibility – although that is precisely what the decision below ultimately demands.

II. Prescriptive Requirements for Federal Nonpoint Source TMDLs Drain Funding and Other Resources from the State-Controlled Programs That Were Intended to Govern Nonpoint Source Control.

Petitioners have accurately described the magnitude of the economic burden (for States and land owners) associated with EPA's demand for federal TMDLs for *all* impaired waters instead of only waters that need more stringent, water quality-based effluent limitations. *See* Petition at 27 (noting estimated $1 billion cost of developing more than 40,000 TMDLs over the next ten years).

Moreover, the financial burden and technical complexity of precisely calculating scientifically defensible "total maximum daily loads" for land use activities siphons funding and other resources from the more pragmatic, flexible, State-based efforts that Congress sought to promote through programs such as CWA § 319.

In November 2000 (six months after the district court ruling in this case), EPA announced new guidelines for the use of § 319 nonpoint source grant funds, recognizing for the first time "*the need to increasingly focus Section 319 grant dollars on implementing approved TMDLs....*" EPA, *Supplemental Guidelines for the Award of Section 319 Nonpoint Source Grants in FY 2001*, at 4 (Nov. 21, 2000) (available at <www.epa.gov/owow/nps/Section319/fy2001.html>) (emphasis added). In this initial announcement, EPA authorized States to use roughly half of the total $238 million appropriated for the coming year for the development or implementation of federally approved nonpoint source TMDLs. *Id.* The "increasing[] focus" on funding nonpoint source TMDLs continued in fiscal year 2002, with EPA *requiring* half of the total funding, or roughly $100 million, to be used only to develop or implement approved nonpoint source TMDLs. *See* EPA, *Supplemental Guidelines for the Award of Section 319 Nonpoint Source Grants to States and Territories in FY 2003*, at 2 (Aug. 26, 2002) (available at <www.epa.gov/owow/nps/Section319/319guide03.htm>). EPA modified this approach somewhat for fiscal year 2003, allowing States to also use these funds for watershed-based initiatives affecting § 303(d)(1) listed waters that do not yet have approved TMDLs – provided that the States would later modify their plans to comply with federally approved TMDLs. *Id.* at 3.

The substantial burden of developing numeric "daily loads" and "allocations" for nonpoint source land use activities (which are by their nature intermittent, highly variable, and ill suited for measurement) certainly justifies a high level of economic assistance to the States. But the question remains whether the calculation of such pollutant limits – which arguably create only a false sense of precision – adds to, or detracts from, the process of improving nonpoint source control. Indeed, prior to the shift in focus toward nonpoint source TMDLs, EPA's § 319 funding guidance proclaimed the paramount importance of *flexibility* in State nonpoint source planning.

According to EPA's most recent prior comprehensive funding guidance: "A fundamental principle of this guidance is that States should have the flexibility to use section 319 grant funds in a manner that they determine will best implement their nonpoint source management programs effectively." EPA, *Nonpoint Source Program and Grants Guidance for Fiscal Year 1997 and Future Years*, at 16 (May 1996) (available at < http://www.epa.gov/owow/nps/guide.html>). The agency declared that "EPA is committed to providing States great flexibility in determining *their own priorities and methods* for choosing and implementing watershed projects" and authorized the use of § 319 grant funds for any activities that would implement the State's nonpoint source management program. *Id.* at 18, 21 (emphasis added).

Regardless of the technical merit and utility of nonpoint source TMDLs in general, it is certain that the demand for federally approved nonpoint source TMDLs has become a burden that consumes resources otherwise available for identifying and implementing the best modern practices to reduce nonpoint source pollution. Such federal TMDLs and load allocations among sources also dramatically reduce the States' flexibility to pursue innovative, adaptive approaches and to react to changing land uses and development patterns. Notwithstanding Congress's broad authorization of funding to support *any* State projects to implement an approved nonpoint source management program, *see* 33 U.S.C. § 1329(h)(1), § 319 funding has evolved into a mechanism for financing federally approved, inflexible, *de facto* effluent limitations for land use activities. Such limitations contribute nothing to the identification and implementation of effective, on-the-ground control measures and indeed undermine the less quantitative, but more pragmatic, programs that were designed to address nonpoint sources.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
WILLIAM R. MURRAY
AMERICAN FOREST &
PAPER ASSOCIATION
1111 19th Street, NW
Suite 400
Washington, DC 20036
(202) 463-2782

STEVEN P. QUARLES
Counsel of Record
ELLEN B. STEEN
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
(202) 624-2500

Attorneys for American Forest & Paper Association and California Forestry Association

MARCH 2003

Supreme Court, U.S.
FILED
APR 14 2003
OFFICE OF THE CLERK

No. 02-1186

In The

Supreme Court of the United States

GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO, AS TRUSTEES FOR GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO TRUST, *ET AL.*,

Petitioners,

v.

WAYNE NASTRI, REGIONAL ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 9, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOSEPH J. BRECHER
Counsel of Record
436 14th Street, Suite 1300
Oakland, California 94612
(510) 482-2916

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

RULE 29.6 STATEMENT

None of the Respondents has a parent corporation or stock owned by a publicly traded company.

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	EPA'S INTERPRETATION OF THE CLEAN WATER ACT IS ENTITLED TOP DEFERENCE BY THE COURTS	1
III.	PETITIONERS' POLICY ARGUMENTS ARE BADLY FLAWED AND SHOULD NOT BE ACCEPTED BY THIS COURT	6
IV.	CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995) 5

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) ..... *passim*

Dioxin/Organochlorine Center v. Clarke, 57 F.3d 1517 (9th Cir.1995) 10

Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 2

I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987) 4

Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. 221 (1986) 5

National Federation of Federal Employees, Local 1309 v. Department of Interior, 526 U.S. 86 (1999) 4

National Railroad Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992) 3

Northern Plains Resource Council v. Fidelity Exploration and Dev. Co., ___ F.3d ___ (9th Cir. No. 02-35836, April 10, 2003) 8

Pronsolino v. Nastri, 291 F.3d 1123 (9th Cir. 2002) 9

Quarles Petroleum Co., Inc. v. U.S., 551 F.2d 1201 (Ct. Claims 1977) 7

Quivira Min. Co. v. U.S.E.P.A., 765 F.2d 126 (10th Cir. 1985) 7

Regions Hosp. v. Shalala, 522 U.S. 448 (1998) 3

Train v. City of New York, 420 U.S. 35 (1975) 7

U.S. v. Haggar Apparel Co., 526 U.S. 380 (1999) 3

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Clean Water Act §208 6

Clean Water Act §303(d) 3, 5, 6

Clean Water Act §319 6

33 U.S.C. §1251(a)(7) 7

U.S. Supreme Court Rule 10 1

U.S. Supreme Court Rule 15.2 8

1972 U.S.C.C.A.N. 3668, 3675 7

I. INTRODUCTION

Defendants-Intervenors-Appellees Pacific Coast Federation of Fishermen's Associations, *et al.* ("PCFFA") opposes the petition for writ of certiorari. This case does not present any reason why a writ of certiorari should be granted. Petitioners attempt to characterize their disagreement with the unanimous ruling of the Court of Appeals in terms of supposed conflicts with this Court's rulings. In fact, however, their argument is nothing more than a series of contentions that the Court of Appeals did not properly apply this Court's precedents. As we show below, that contention is incorrect. But even if it were true, as Supreme Court Rule 10 instructs, "A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

II. EPA'S INTERPRETATION OF THE CLEAN WATER ACT IS ENTITLED TOP DEFERENCE BY THE COURTS

Petitioners contend (pp. 7-14) that the Court of Appeals' analysis of whether EPA's regulations are entitled to *Chevron* deference is flawed, claiming that the Ninth Circuit "got it precisely backwards" because it should have discussed whether the statutory language is ambiguous before determining that deference was appropriate. As we show below, the Ninth Circuit opinion addressed the ambiguity issue in great detail. Petitioners' complaint, then, is reduced to a claim that the order in which the opinion discussed the *Chevron* factors is incorrect. Such a claim hardly warrants the attention of this Court.

In a case cited by Petitioners (p. 7) *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000), this Court explained that the agency's viewpoint prevails in cases of statutory ambiguity and set forth a road map as to how to determine such issues:

> But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible. Such deference is justified because the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones, and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated.

The opinion continued:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. Ambiguity is a creature not of definitional possibilities but of statutory context. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole.

The Ninth Circuit followed these instructions to the letter. First, in a section of the opinion headed "Plain

Meaning and Structural Issues – The Competing Interpretations," beginning at page 135, the opinion carefully analyzed the key statutory term "not stringent enough to implement . . . water quality standard[s]" as used in Clean Water Act §303(d)(1)(A), which is at the heart of the controversy. It set out the conflicting interpretations of that language, as offered by Petitioners and by EPA. In footnote 14 and the accompanying text, the Court compared various ways the term "stringent" could be used, noting the somewhat conflicting dictionary definitions for the word in question, and acknowledged that the definition advanced by both sides had some plausibility. But it determined that EPA's interpretation was better supported by linguistic considerations. As this Court noted in *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992), "The existence of alternative dictionary definitions of the word 'required,' each making some sense under the statute, itself indicates that the statute is open to interpretation."

The very silence of the Clean Water Act on the precise question at issue here supports the inference that the statute is ambiguous: "Although the statute . . . gives direction not only by stating a general policy . . . but also by determining some specifics of the policy . . . , the statute is ambiguous nonetheless in that the agency must use its discretion to determine how best to implement the policy in those cases not covered by the statute's specific terms." *U.S. v. Haggar Apparel Co.*, 526 U.S. 380, 381 (1999). See also *Regions Hosp. v. Shalala*, 522 U.S. 448, 449 (1998).

In the present case,

> There is obviously some ambiguity in a term like "[not stringent enough to implement . . . water

> quality standards]" which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling any gap left, implicitly or explicitly, by Congress, the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (citations and internal quotations omitted).

The situation in this case is analogous to that described by this Court in *National Federation of Federal Employees, Local 1309 v. Department of Interior*, 526 U.S. 86, 95 (1999):

> The Statute does not indicate that Congress itself decided to make these specific policy judgments. Hence the Agency's policy arguments illustrate the need for the Authority's elaboration or refinement of the basic statutory [requirement] . . . ; they illustrate the appropriateness of judicial deference to considered [Agency] views on the matter; and, most importantly, they do not narrow the scope of a statutory provision the language of which is consistent with a variety of interpretations.

The law with respect to agency interpretation of complex environmental statutes can best be summarized by this Court's statement with respect to the crucial definition of "take" under the Endangered Species Act:

> We need not decide whether the statutory definition of "take" compels the Secretary's interpretation of "harm," because our conclusions that

> Congress did not unambiguously manifest its intent to adopt respondents' view and that the Secretary's interpretation is reasonable suffice to decide this case. [Citing *Chevron*]. The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703 (1995).

Elaborating on this theme, this Court stated in *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 233 (1986), . . . [I]f a statute is silent or ambiguous with respect to the question at issue, our longstanding practice is to defer to the executive department's construction of a statutory scheme it is entrusted to administer, unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress." (Citations and internal punctuation omitted).

After parsing the etymology and meaning of the language of Section 303(d), the Ninth Circuit opinion turned to the question of legislative intent. It conducted a detailed examination of the statutory scheme to determine whether Petitioners were correct in asserting that the Clean Water Act did not contemplate TMDLs for nonpoint sources. The Court pointed out that:

> Point sources are treated differently from nonpoint sources for many purposes under the statute, but not all. In particular, there is no such distinction with regard to the basic purpose for which the § 303(d) list and TMDLs are compiled, the eventual attainment of state-defined water quality standards. *Id.* at 1137.

The Ninth Circuit correctly noted that the existence of certain planning and reporting mechanisms under §§208 and 319 of the Clean Water Act that apply only to nonpoint sources does *not* mean that such sources should not be regulated under the TMDL provision of §303. *Id.* at 1138-39. Thus, the court of Appeals concluded, *Chevron* deference is appropriate.

Even if EPA's regulations are not entitled to absolute deference afforded to an agency's interpretation of an ambiguous statute, they are still entitled to significant respect by the courts. As the *Chevron* opinion pointed out:

> But whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered. The well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance, and we have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . . *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984). (Citations and internal punctuation omitted).

III. PETITIONERS' POLICY ARGUMENTS ARE BADLY FLAWED AND SHOULD NOT BE ACCEPTED BY THIS COURT

Petitioners' policy arguments are inherently self-contradictory. They assert (Petition, p. 27) that TMDLs

should not be applied to half the impaired waters in the country, claiming (pp. 21-24) that the task of cleaning up waters impaired solely by nonpoint sources should be left entirely to the States, even though they acknowledge that the States don't have the money to do the job (p. 27). The practical effect of their contention would be that there would be no movement to clean up 43% of the polluted waters in America (Petition, p. 27 note 11).

This is certainly not what Congress intended. The Legislature passed the sweeping 1972 Clean Water Act amendments precisely because the previous policy of leaving the issue to the States had resulted in a totally ineffective clean-up program. 1972 U.S.C.C.A.N. 3668, 3675. Those amendments established "a comprehensive program for controlling and abating water pollution." *Train v. City of New York*, 420 U.S. 35, 37 (1975). "[T]he overall intention of Congress in enactment of the Federal Water Pollution Control Act was to eliminate or to reduce as much as possible all water pollution throughout the United States. *Quarles Petroleum Co., Inc. v. U.S.*, 551 F.2d 1201, 1206 (Ct. Claims 1977). Furthermore, "It is the intent of the Clean Water Act to cover, as much as possible, all waters of the United States instead of just some." *Quivira Min. Co. v. U.S.E.P.A.*, 765 F.2d 126, 129 (10th Cir. 1985). Congress did not intend that pollution from nonpoint sources be ignored. Rather, the Clean Water Act states explicitly: "It is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution." 33 U.S.C. §1251(a)(7). Allowing nonpoint sources to continue to pollute streams like the Garcia "would improperly

undermine the integrity of [the CWA's] prohibitions." *Northern Plains Resource Council v. Fidelity Exploration and Dev. Co.* ___ F.3d ___, ___ (9th Cir. No. 02-35836, April 10, 2003).

Contrary to Petitioners' assertion, the TMDL program does not constitute an intrusive intervention into the States' traditional realm. The State of California eagerly supported EPA's position throughout the litigation, participating substantially in the proceedings before the District Court and filing an *amicus* brief in the Court of Appeals. The latter brief was joined by six other states, including Washington and Oregon, both of which have substantial timber operations. Not a single State has indicated support for Petitioners' position.

The seven *amici* States pointed out that, far from meddling in their affairs, the federal TMDL program:

> provides the necessary information so that state regulatory agencies can impose appropriate best management practices on land owners, based on applicable state law. . . . Thus, the federal government's TMDL program provides the information so that States can make informed water quality decisions, but does not usurp that decision-making power. By empowering States, this process actually enhances state and local control. Brief of *Amici Curiae*, p. 20.

As required by Supreme Court Rule 15.2, PCFFA must point out that Petitioners have seriously misstated the practical import of the decision. They claim (Petition, p. 5) that the EPA TMDL imposed a "dramatic" impact on landowners and that the Pronsolinos and a neighbor were forced to endure "onerous new obligations to satisfy EPA's TMDL" which added millions of dollars to the cost of their

timber operations. But, in fact, those expenses were not caused by *EPA's* demands but, rather, were incurred in order to comply with permit requirements imposed by the State of California. As the Ninth Circuit opinion noted, the restrictions about which Petitioners complain were all imposed as conditions of a permit issued by the California Department of Forestry. See *Pronsolino v. Nastri*, 291 F.3d 1123, 1129-30 and note 6 (9th Cir. 2002).

Indeed, a high-ranking official of the Department of Forestry indicated that the contents of those permits were not influenced, at all, by the EPA TMDL process. Deposition of Thomas Osipowich 89:2-6. That official acknowledged that the EPA TMDL does not require any individual landowner to do any particular thing. *Id.* 93:5-14. See also Lundborg Deposition 90:22-91:1; 93:9-94:5; 105:5-8; 118:1-4. An official of the State agency responsible for water quality, including TMDLs, the North Coast Regional Water Quality Control Board, testified that the existence or non-existence of the federal TMDL would have made no difference as to how her agency reviewed the Pronsolinos' timber harvest plan. Lundborg Deposition 96:5-17.

Thus, the federal TMDL is not self-enforcing and contains no requirements that landowners take any specific action. Ms. Lundborg testified that the federal TMDL, lacking an enforcement or monitoring mechanism, is not, by itself, an effective regulatory tool. Lundborg Deposition 118:8-22. In short, the record indicates that EPA's TMDL has not cost the Petitioners (or anyone else) one cent.

Rather, the federal TMDL program serves only as an information gathering tool. But that tool is an extremely important one. For example, the federal TMDL program

allowed for the funding of between 5 and 10 positions in the North Coast Regional Water Quality Control Board to deal with impacts to impaired rivers. Lundborg Deposition 83:8-21. And the federal TMDL generated an outreach program that enabled landowners in the Garcia River drainage to achieve best management practices. Lundborg Deposition 91:2-13. See also Brief of *Amici Curiae*, p. 20.

IV. CONCLUSION

In conclusion, this is not a proper case for review by this Court. Petitioners concede (Petition, p. 25) there is no conflict among the Circuits on this issue. The case does not establish new law, since the Ninth Circuit has already held that TMDLs are appropriate for streams where effluent limitations do not apply. See *Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517, 1526-27 (9th Cir.1995). As shown above, the Court of Appeals' statutory analysis comports with the requirements laid out in the *Chevron* case. The position espoused by the *amici* debunks the notion that EPA's TMDL program is a threat to federalism. And that program does not inflict ruinous expense on landowners, since it is not self-enforcing and does not impose any mandatory requirements on anyone. The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH J. BRECHER
436 14th Street, Suite 1300
Oakland, California 94612
(510) 832-2800

April 2003

Supreme Court, U.S.
FILED
MAY 16 2003
OFFICE OF THE CLERK

No. 02-1186

In The
Supreme Court of the United States

GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO, AS TRUSTEES FOR GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO TRUST, *et al.*,

Petitioners,

v.

WAYNE NASTRI, REGIONAL ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALEXANDRA DAPOLITO DUNN
General Counsel
ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES
1816 Jefferson Place, N.W.
Washington, D.C. 20036-2505
(202) 533-1803

LAJUANA S. WILCHER
Counsel of Record
ENGLISH, LUCAS, PRIEST & OWSLEY
1101 College Street
P.O. Box 770
Bowling Green, KY 42102-0770
(270) 781-6500

Attorneys for the Association of Metropolitan Sewerage Agencies

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether § 303(d)(1) of the Clean Water Act ("CWA"), 33 U.S.C. § 1313(d)(1) authorizes the U.S. Environmental Protection Agency ("EPA") to determine whether the imposition of statutorily specified effluent limitations will enable certain waters to achieve federally approved water quality standards and to identify and list those waters that will not, regardless of the source of the pollution.

II. Whether § 303(d) of the CWA authorizes EPA to establish total maximum daily loads for those waters identified on a § 303(d)(1) list.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption of the petition, the Association of Metropolitan Sewerage Agencies ("AMSA") participated in the case below as a defendant-intervenor-appellee, as did fifteen other groups. Those groups are the Pacific Coast Federation of Fishermen's Associations, Golden Gate Fishermen's Association, Sierra Club, Environmental Protection Information Center, Coast Action Group, Friends of the Garcia, California Trout, Klamath Forest Alliance, Mendocino Environmental Center, Willits Environmental Center, California Wilderness Coalition, Friends of the Navarro River, South Fork Mountain Defense Committee, Northcoast Environmental Center, and San Francisco Baykeeper. In addition, two parties participated as plaintiff-intervenor-appellants. Those parties are the American Forest & Paper Association and the California Forestry Association.

RULE 29.6 STATEMENT

The Respondent Association of Metropolitan Sewerage Agencies ("AMSA") has no parent corporation or stock owned by a publicly held company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
ARGUMENT	3
I. The Language, Structure, Purpose and Legislative History of the CWA Do Not Exclude Nonpoint Sources from the TMDL Program	3
II. The CWA's TMDL Program Does Not Impose Federal Regulation on Nonpoint Source Pollution, and Does Not Implicate a Federalism Issue in this Case	7
III. The Decision Below Does Not Conflict With This Court's Precedents	8
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Arkansas v. Oklahoma, 503 U.S. 91 (1992) 3

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) 9

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 9

United States v. Mead Corp., 533 U.S. 218 (2001) 9

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 3

United States v. Turkette, 452 U.S. 576 (1981) 10

STATUTES

Clean Water Act, 33 U.S.C. §§ 1251-1387

§ 101(a), 33 U.S.C. § 1251(a) 3

§ 101(a)(7), 33 U.S.C. § 1251(a)(7) 4

§ 303, 33 U.S.C. § 1313 ..... *passim*

§ 303(d), 33 U.S.C. § 1313(d) ..... *passim*

§ 303(d)(1), 33 U.S.C. § 1313(d)(1) ..... *passim*

§ 304(f), 33 U.S.C. § 1314(f) 4

§ 320(a)(2), 33 U.S.C. § 1330(a)(2) 4

§ 402, 33 U.S.C. § 1342 7

OTHER AUTHORITIES

H.R. Rep. No. 92-911, at 106 (1972), *reprinted in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 793 (1973) 6

TABLE OF AUTHORITIES – Continued

Page

H.R. Rep. No. 92-911, at 109 (1972), *reprinted in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 796 (1973) 6

INTRODUCTION

The Association of Metropolitan Sewerage Agencies ("AMSA"), defendant-intervenor-appellee, is a trade association that represents nearly 300 publicly-owned treatment works that serve the majority of the sewered population in the United States. As are other point sources regulated under the CWA and subject to total maximum daily loads ("TMDLs"), AMSA's members are affected significantly if nonpoint sources are not included in the TMDL process established by § 303(d) of the CWA. If nonpoint contributions to water quality impairment are not properly identified, calculated and allocated, point sources may be required to clean up pollution emanating from upstream water segments polluted only by nonpoint sources. 33 U.S.C. § 1313(d). In some cases, a downstream point source facility could never comply with water quality standards if upstream nonpoint sources are not identified and addressed.

The Ninth Circuit held that the U.S. Environmental Protection Agency ("EPA") did not exceed its statutory authority in identifying and establishing TMDLs for the Garcia River in California, even though the river was polluted only by nonpoint sources of pollution. (Pet. App. at 31a). Petitioners seek review of that decision.

In the district court, petitioners originally sought to enjoin EPA from listing or issuing TMDLs for waters that were impaired by (1) a combination of point sources and nonpoint sources, as well as (2) waters that were impaired by nonpoint sources only. In their opening brief, petitioners contended that the listing and TMDL requirements of § 303(d) were "exclusively reserved for point sources" and that § 303(d) "focuses solely on point sources of pollution."

(Pet. App. at 50a). Petitioners modified their position in their reply, arguing that a water body impaired by both point and nonpoint sources should be listed under § 303(d). (Pet. App. at 50a). Petitioners now argue that waters polluted only by nonpoint sources of pollution should not be listed and should not be included in the TMDL program. This position ignores the context and language of § 303(d) and the structure of the CWA, frustrates the Act's objective and goals, and results in a wholly unworkable program for TMDL administrators and for those entities, such as AMSA's members, with CWA regulatory compliance obligations. The Ninth Circuit evaluated the language and structure of § 303(d) and held:

> Nothing in the statutory structure – or purpose – suggests that Congress meant to distinguish, as to § 303(d)(1) lists and TMDLs, between waters with one insignificant point source and substantial nonpoint source pollution and waters with only nonpoint source pollution. Such a distinction would, for no apparent reason, require the states or the EPA to monitor waters to determine whether a point source has been added or removed, and to adjust the § 303(d)(1) list and establish TMDLs accordingly. There is no statutory basis for concluding that Congress intended such an irrational regime. (Pet. App. at 28a).

The court's analysis, and its conclusion that deference to EPA was appropriate to the extent that § 303(d) could be deemed ambiguous, is not in conflict with any relevant decisions of this Court. Accordingly, petitioners have presented no compelling reason for the petition for certiorari to be granted.

ARGUMENT

I. The Language, Structure, Purpose and Legislative History of the CWA Do Not Exclude Nonpoint Sources from the TMDL Program.

The CWA is a comprehensive, water quality statute that authorizes a variety of regulatory and nonregulatory tools and approaches in an effort to achieve a singular objective . . . "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985). This objective applies to all waters of the U.S., without limitation, regardless of the source of the water quality impairment. To accomplish this objective, some CWA provisions apply only to point sources of pollution, some apply to nonpoint sources of pollution, and some, like § 303(d), apply to both point sources and nonpoint sources.

The tools forged in the CWA to accomplish its bold objective are multifaceted, establishing federal and state authority, mandatory and discretionary duties, and incentive and enforcement provisions. Some sections address broad, holistic water quality goals, and others prescribe precise regulatory requirements. In many cases, Congress provided different, and even overlapping, approaches and statutory authorities to address water quality problems.

Petitioners erroneously suggest that §§ 208 and 319 of the CWA define the limits of the CWA's nonpoint source authority and limit the application of § 303(d). Nothing in the language of either section addresses § 303(d)(1) listing of impaired waters. Petitioners reason that because nonpoint sources are addressed in these sections, § 303(d) is not applicable to nonpoint source impaired waters. This

position is not consistent with the structure and scope of the CWA. Nonpoint sources are addressed either specifically or by implication in numerous other non-regulatory CWA provisions, including CWA § 304(f) (identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution), § 320(a)(2) (the national estuary program) and § 101(a)(7) (national policy to control nonpoint sources of pollution). *See* 33 U.S.C. § 1314(f), 33 U.S.C. § 1330(a)(2) and 33 U.S.C. § 1251(a)(7). All of these provisions address nonpoint sources, but none purports to be the exclusive remedy for nonpoint source impaired waters. None limits the scope of § 303(d). None of these provisions, including § 303, read individually or together, precludes EPA from listing waters impaired solely by nonpoint sources pursuant to § 303(d)(1).

Given that nonpoint sources are solely responsible for impairment in 54 percent of California's waters, and contribute, along with point sources, to impairment in another 45 percent of the waters of the state (Pet. App. at 34a), it is clear that a variety of CWA provisions must be employed to achieve the CWA's national policy and its objective: controlling nonpoint sources of pollution, and restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. Petitioners' suggestion that only two provisions of the CWA were intended to address this significant water quality challenge is absurd. Failure to address the substantial amount of nonpoint source pollution impairing U.S. water quality through the TMDL program would frustrate the objective, goals and policy of the CWA. Nonpoint sources should not be excluded from the TMDL program.

The CWA does not limit § 303(d)(1) lists to those waters impaired in whole or in part by point sources; it

does, however prescribe a process and an evaluation that should be conducted before determining whether an impaired water body should be listed and a TMDL should be developed. This is a plain and rational reading of the language of the statute, and is consistent with the CWA's overall structure.

When the CWA was enacted in 1972, Congress sought to address point sources with an aggressive federal regulatory program. The focus of the point source regulatory program was on achieving compliance with technology-based requirements, which would apply broadly to all dischargers of a certain type or category. In § 303(d), Congress created an incremental approach for improving water quality. For waters failing to meet water quality standards, states would first consider whether technology-based effluent limitations might enable an impaired water segment to meet standards before initiation of a lengthy and expensive TMDL process. States were to determine where the application of technology-based controls would not bring the waters into compliance. That could be the case if point source dischargers were not permitted, if point source dischargers were not meeting their permit limits, if nonpoint sources were contributing to the pollution such that technology-based point source limits would not remedy the water quality impairment, or if point source dischargers were simply not a part of the problem, *i.e.*, a water body impaired only by nonpoint sources. Then § 303(d) would require that states or EPA could take the next step to consider listing the water under § 303(d)(1) and employing other tools available to them to achieve the goals and objective of the CWA. These other tools might include additional, more stringent water quality-based requirements on point sources. Another approach could be

the identification of nonpoint sources causing the pollution so that states or local governments could take appropriate action to achieve the objective of the Act. That Congress meant to *include* waters impaired by point sources where technological controls had not attained water quality standards – as the legislative history shows – does not prove that it intended to *exclude* nonpoint sources from the TMDL requirements. (Pet. App. at 29) (citations omitted).

Clearly, Congress recognized the serious water quality problems caused by nonpoint source pollution when it enacted the CWA in 1972, stating that nonpoint sources of pollution "are a major contributor to water quality problems." H.R. Rep. No. 92-911, at 106 (1972), *reprinted in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 793 (1973). The House Committee on Public Works further noted that "[i]f our water pollution problems are to be truly solved, we are going to have to vigorously address the problems of nonpoint sources." H.R. Rep. No. 92-911, at 109 (1972), *reprinted in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 796 (1973).

The language of the CWA does not exclude nonpoint sources from being identified under § 303(d)(1) and addressed by federal non-regulatory programs, and by whatever state and local authorities, regulatory or non-regulatory, are available. This reading of § 303(d) is reasonable, logical, and consistent with both the language and the structure of § 303 and the Act as a whole, as well as the legislative history, which encourages stemming the flow of nonpoint source pollution in several CWA contexts.

II. The CWA's TMDL Program Does Not Impose Federal Regulation on Nonpoint Source Pollution, and Does Not Raise a Federalism Issue in this Case.

Petitioners seek certiorari under the specter of federalism, arguing that establishing CWA § 303(d)(1) lists and developing TMDLs amount to regulation of nonpoint sources, a role reserved to the states. Development of a TMDL by EPA is not tantamount to federal land use control, contrary to the assertion in Petitioners' Question 3. EPA neither has nor claims to have authority to regulate nonpoint sources. EPA has the obligation to develop § 303(d)(1) lists and TMDLs for substandard waters when states fail to act. *See* 33 U.S.C. § 1313. The courts below found that § 303(d)(1) listing of waters impaired by nonpoint sources and developing TMDLs for those waters was not tantamount to regulation, and petitioners submit no rational basis for claiming otherwise.

In enacting the CWA, Congress recognized the responsibilities and rights of states to prevent, reduce, and eliminate pollution, but created a significant federal leadership role in virtually all programs established by the CWA. One role was that of regulator of point sources under the CWA's national pollutant discharge elimination system ("NPDES"). *See* 33 U.S.C. § 1342. Under that regulatory program, EPA may override delegated states' proposed permit conditions, and insert its own conditions into state-issued NPDES permits. In addition, EPA may bring a federal enforcement action against point sources like AMSA's members for significant civil and criminal penalties if they fail to obtain or comply with an NPDES permit. As AMSA and other point sources can attest, these are elements of regulation. Creating a list and developing

a TMDL are not. TMDLs are not self-executing and do not impose regulatory requirements on any entity until they are incorporated into a regulatory regime.

If EPA develops a TMDL that includes nonpoint sources, states certainly may incorporate the TMDL into a state permit or other enforceable state mechanism. Such state action may be considered regulation, but merely listing impaired waters pursuant to § 303(d)(1) and developing a TMDL may not. The allocation of roles between EPA and the states is one that Congress clearly established when addressing nonpoint sources under the CWA, and one which is not contravened when EPA lists impaired waters and develops a TMDL, and the state incorporates aspects of the TMDL into its own regulatory programs in order to improve the state's water quality.

III. The Decision Below Does Not Conflict with This Court's Precedents.

Petitioners argue that the court below failed to follow precedents of this Court in its evaluation and interpretation of § 303(d) of the CWA, and that the court improperly deferred to EPA in finding that nonpoint sources should be included in the TMDL program. Petitioners then ignore the lengthy evaluation and analysis of the Ninth Circuit as it parsed the language and structure of § 303(d), and held that, "[b]ased on the language of the contested phrase alone, then, the more sensible conclusion is that the § 303(d)(1) list must contain any waters for which the particular effluent limitations will not be adequate to attain the statute's water quality goals." (Pet. App. at 21a-22a). The Ninth Circuit dissected and examined the statutory context of § 303(d), and thoroughly evaluated the

CWA's statutory scheme as a whole. (*See* Pet. App. at 25a-29a). The court considered the issue from several perspectives, and concluded that including nonpoint sources in the TMDL program was the most reasonable interpretation from the language and structure of § 303(d), that it was the best interpretation when considering the statutory scheme as a whole, and that if there were any ambiguity, deference to EPA would be appropriate under either *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The court then determined that under *United States v. Mead Corp.*, 533 U.S. 218 (2001), the instant case was indeed entitled to *Chevron* deference.

Under *Chevron* deference, it is significant that EPA has consistently maintained its interpretation that nonpoint sources are subject to listing under § 303(d)(1). Petitioners misstate the facts when claiming that EPA did not construe § 303(d)(1) as applicable to waters impaired only by nonpoint sources for two decades after the 1972 legislation was enacted. Although petitioners claim that EPA changed its position in the early 1990s, nothing could be further from the truth. As the district court found, "[a]lthough EPA was exceedingly slow to implement TMDL requirements, EPA has not taken a position in conflict with its construction urged in this case. To the contrary, EPA's first description of the TMDL process in its revised Water Quality Planning & Management Regulations is fully consistent." (Pet. App. at 68a, FN. 17) (citations omitted). The TMDL regulations promulgated by EPA in 1985, after public notice and comment, specifically addressed nonpoint sources as did the 1992 revised regulations.

Moreover, petitioners' interpretation of § 303(d) will lead to absurd and reckless results. Under the approach

propounded by petitioners, a water segment could be polluted by runoff from an upstream forestry or agricultural operation, causing water quality standards to be impaired. The pollution could flow into a downstream segment, causing pollution to exceed standards there, also. Under petitioners' interpretation, if no point sources discharged to either segment, the stream would not be listed under § 303(d)(1). But if a single point source, such as stormwater from a municipal parking lot, discharged into the downstream segment, it would be listed and a TMDL would be established. This would occur even if the most significant water pollution originated upstream and even if the nonpoint operation contributed far more pollution than the stormwater runoff. An absurd result, such as the one petitioners seek, should be avoided. *See United States v. Turkette*, 452 U.S. 576, 580 (1981).

CONCLUSION

Accordingly, AMSA respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

ALEXANDRA DAPOLITO DUNN
General Counsel
ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES
1816 Jefferson Place, N.W.
Washington, D.C. 20036-2505
(202) 533-1803

LAJUANA S. WILCHER
Counsel of Record
ENGLISH, LUCAS, PRIEST & OWSLEY
1101 College Street
P.O. Box 770
Bowling Green, KY 42102-0770
(270) 781-6500

Attorneys for the Association of Metropolitan Sewerage Agencies

May 2003

Supreme Court, U.S.
FILED
MAY 16 2003
OFFICE OF THE CLERK

No. 02-1186

In the Supreme Court of the United States

GUIDO A. PRONSOLINO, ET AL., PETITIONERS

v.

WAYNE NASTRI, REGIONAL ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, REGION 9, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

THOMAS L. SANSONETTI
Assistant Attorney General

GREER S. GOLDMAN
RONALD M. SPRITZER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Section 303(d)(1)(A) of the Clean Water Act requires each State to identify those waters within its boundaries for which "effluent limitations," which are technology-based restrictions on point-source discharges of pollutants, "are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. 1313(d)(1)(A). Section 303(d)(1)(C) further requires States to develop informational tools, known as "total maximum daily loads" (TMDLs), for pollutants of those waters. 33 U.S.C. 1313(d)(1)(C). The question presented is:

Whether the court of appeals properly affirmed the Environmental Protection Agency's determination that Section 303(d)'s requirements apply to waters that are not presently subject to point source discharges of pollutants, and are therefore not presently subject to effluent limitations, but nevertheless fail to satisfy the applicable water quality standards owing to pollution from nonpoint sources.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Arkansas v. *Oklahoma*, 503 U.S. 91 (1992)	13, 14
City of Chicago v. *Environmental Def. Fund*, 511 U.S. 328 (1994)	11
E.I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112 (1977)	3
EPA v. *California*, 426 U.S. 200 (1976)	13
Moskal v. *United States*, 498 U.S. 103 (1990)	12
NRDC v. *EPA*, 915 F.2d 1314 (9th Cir. 1990)	5
New York v. *United States*, 505 U.S. 144 (1992)	14
PUD No. 1 of Jefferson County v. *Washington Dep't of Ecology*, 511 U.S. 700 (1994)	13
Pension Ben. Guar. Corp. v. *LTV Corp.*, 496 U.S. 633 (1990)	12
Solid Waste Agency of N. Cook County v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001)	13
United States v *Turkette*, 452 U.S. 576 (1981)	12

Statutes and regulations:

Clean Water Act, 33 U.S.C. 1251 *et seq.*:	
33 U.S.C. 1251(a)	2
33 U.S.C. 1288	11
33 U.S.C. 1311	3

Statutes and regulations—Continued: Page

33 U.S.C. 1311(a) 3, 5
33 U.S.C. 1311(b) 11
33 U.S.C. 1311(b)(1)(A) 3
33 U.S.C. 1311(b)(1)(B) 3
33 U.S.C. 1311(b)(2) 3
33 U.S.C. 1313 ..... 2, 11
33 U.S.C. 1313(c)(2)(A) 3
33 U.S.C. 1313(d) 2, 7, 8, 9, 10, 11, 12, 13
33 U.S.C. 1313(d)(1) 4, 5, 6, 7, 8, 10
33 U.S.C. 1313(d)(1)(A) 3, 4, 6, 10, 11
33 U.S.C. 1313(d)(1)(C) 4, 6
33 U.S.C. 1313(d)(2) 4
33 U.S.C. 1314 3
33 U.S.C. 1314(b) 3
33 U.S.C. 1314(*l*)(1)(B) 11
33 U.S.C. 1316 11
33 U.S.C. 1316(b)(1)(B) 3
33 U.S.C. 1317(a) 11
33 U.S.C. 1317(b) 11
33 U.S.C. 1329 ..... 12, 14
33 U.S.C. 1329(h) 5
33 U.S.C. 1342(a) 3
33 U.S.C. 1342(b) 3
33 U.S.C. 1362(12) 5
33 U.S.C. 1362(14) 5
Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 2
Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 2
Cal. Code Regs. tit. 14 (2003):
§ 898.1(c)(1) 6
§ 916.3 6
40 C.F.R.:
Section 122.44(d)(1)(vii)(B) 5
Section 130.7(b) 4
Section 131.3(b) 3

Regulations—Continued: Page

Section 131.3(f) 3
Section 131.6(a) 3
Section 131.6(c) 3
Section 131.10 3
Section 131.11 3

In the Supreme Court of the United States

No. 02-1186

GUIDO A. PRONSOLINO, ET AL., PETITIONERS

v.

WAYNE NASTRI, REGIONAL ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, REGION 9, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 291 F.3d 1123. The opinion of the district court (Pet. App. 33a-71a) is reported at 91 F. Supp. 2d 1337.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2002. A petition for rehearing was denied on October 9, 2002 (Pet. App. 32a). On December 20, 2002, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 6, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, landowners and agricultural and timber trade interests, sued the Environmental Protection Agency (EPA), alleging that EPA had exceeded its authority under the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, in establishing a "total maximum daily load" (TMDL) for the Garcia River in Northern California. TMDLs are primarily "informational tools" that identify the maximum amount of a pollutant that can be added to a water body (its loading capacity) without exceeding a water quality standard for that pollutant. See 33 U.S.C. 1313(d); Pet. App. 9a. The district court rejected petitioners' challenge, *id.* at 33a-71a, and the court of appeals affirmed that decision, *id.* at 1a-31a.

1. The CWA is a complex water pollution control regime established through multiple congressional enactments. It aims "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The statutory scheme employs two overarching strategies to achieve that goal: (1) a "water quality-based approach," originating in the Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903, that identifies water quality standards for specific bodies of water; and (2) a "technology-based approach," originating in the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, that imposes effluent limitations on specific categories of "point sources." Pet. App. 4a-5a.

The States are generally responsible for adopting water quality standards, which define the water quality goals of a water body without regard to the source of potential pollutants. See 33 U.S.C. 1313. A State formulates a water quality standard by identifying the water body's intended uses and specifying criteria—

which can be numeric or narrative—necessary to protect the designated uses. 33 U.S.C. 1313(c)(2)(A); 40 C.F.R. 131.3(b) and (f), 131.6(a) and (c), 131.10, 131.11. Although the CWA requires the States to develop water quality standards, it does not make them directly enforceable as a matter of federal law. Instead, the CWA contains provisions designed to achieve those standards through mechanisms, such as effluent limitations, that restrict actual discharges.

The federal government is generally responsible for developing effluent limitations guidelines and establishing effluent limitations, which impose specific technology-based pollution control requirements for discrete "point" sources of pollutant discharges. See 33 U.S.C. 1311, 1314(b), 1316(b)(1)(B). The federal and state governments apply those effluent limitations to particular point sources through a federal permitting program known as the National Pollutant Discharge Elimination System (NPDES) or through comparable state permitting programs. See 33 U.S.C. 1311(a), (b)(1)(A), (B) and (b)(2), 1314, 1342(a) and (b). See generally *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 116-121, 126-129 (1977).

The CWA envisions that the state-prescribed water quality standards will be implemented through effluent limitations or, if necessary, through other appropriate means. To that end, Section 303(d)(1)(A) of the CWA requires each State to identify those waters for which effluent limitations are inadequate to attain the water quality standards, specifically stating:

> Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to

> implement any water quality standards applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

33 U.S.C. 1313(d)(1)(A). The State identifies its substandard waters, which are known as "water quality-limited segments" (WQLSs), and compiles them on a "303(d)(1) list." See 40 C.F.R. 130.7(b). For those listed waters, the States are to establish "the total maximum daily load" for each pollutant that is present in excess of the prescribed water quality standard. 33 U.S.C. 1313(d)(1)(C).

The TMDL is established at the "level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. 1313(d)(1)(C). Section 303(d)(2) further provides that EPA shall review, and approve or disapprove, each State's 303(d)(1) list and TMDLs. 33 U.S.C. 1313(d)(2). If EPA disapproves a State's list or TMDL, EPA must prescribe an appropriate list or TMDL. 33 U.S.C. 1313(d)(2).

Although TMDLs play an important informational role in the CWA's regulatory scheme, they are not regulations, and they do not impose legal obligations or prohibitions on polluters. Rather, TMDLs identify the reductions in the overall loading of a pollutant in a designated segment of substandard water that are necessary to bring that segment into compliance with a water quality standard, thereby allowing "the states to proceed from the identification of waters requiring additional planning to the required plans." Pet. App.

9a, 68a-69a. "TMDLs serve as a link in an implementation chain that includes federally-regulated point source controls, state or local plans for point and nonpoint source pollution reduction, and assessment of the impact of such measures on water quality." *Id.* at 9a.

When a TMDL identifies necessary reductions in pollutant loading from point sources, such reductions are achieved through restrictions set out in the NPDES permit or state permit for each point source. 33 U.S.C. 1311(a), 1362(12) and (14); 40 C.F.R. 122.44(d)(1)(vii)(B). But when a TMDL identifies necessary reductions in pollutant loadings from nonpoint sources, such reductions may be implemented only under state law, because the CWA does not have a permit program for, or otherwise regulate pollutant loadings from, nonpoint sources. See *NRDC* v. *EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990). EPA has no authority to enforce TMDL pollutant-loading reductions against nonpoint sources or to require a State to do so. EPA may, however, disburse funds to the States to assist their implementation of nonpoint source management programs, including the development of best management practices to control non-point source pollution. See 33 U.S.C. 1329(h); *NRDC*, 915 F.2d at 1318.

2. In 1992, California submitted its 303(d)(1) list of impaired waters to EPA. EPA partially disapproved the list because the State did not list 17 impaired northern coast rivers, including the Garcia River. EPA established a new list for California, adding those water bodies. California's subsequent lists included those rivers, but the State did not develop TMDLs for them. Pet. App. 9a-10a. After EPA was sued on account of the slow pace of TMDL development for northern California, the agency entered into a consent decree in *Pacific Coast Federation of Fishermen's Ass'ns* v.

Coast Action Group, No. 95-4474 (N.D. Cal. filed Mar. 10, 1997), requiring the agency to guarantee that TMDLs would be developed for the northern coast rivers. Pet. App. 10a.

The State failed to submit a final TMDL for the Garcia River by the consent decree deadline, and EPA established its Garcia River TMDL. Pet. App. 10a. EPA's TMDL calculated a maximum sediment load at an average of 552 tons per square mile per year and allocated that total among various categories of nonpoint sources, including mass wasting (landsliding) associated with roads, mass wasting from timber harvesting, and erosion from road surfaces. *Ibid.*

3. In 1998, the Pronsolinos applied to the California Department of Forestry (CDF) for a permit to harvest timber on their land in the Garcia River watershed. Pet. App. 10a. Under state law, CDF is charged with ensuring that timber harvesting does not have a significant effect on the environment. See, *e.g.*, Cal. Code Regs. tit. 14, §§ 898.1(c)(1), 916.3 (2003). CDF issued a permit to the Pronsolinos containing provisions designed to implement the Garcia River TMDL by reducing sediment loads associated with road building and maintenance, tree removal, and other timber harvesting activities. Pet. App. 11a n.6. Rather than objecting to those conditions during the state permitting process, the Pronsolinos and other petitioners filed this suit, claiming that EPA lacked authority to list the Garcia River under Section 303(d)(1) and to establish TMDLs on rivers polluted only by nonpoint sources. *Id.* at 11a-12a.

On cross-motions for summary judgment, the district court ruled that Sections 303(d)(1)(A) and 303(d)(1)(C) required listing of the Garcia River and establishment of a TMDL because that river did not satisfy the appli-

cable water quality standard. The court determined that the Garcia River was subject to those requirements regardless of whether the river was polluted by point sources subject to effluent limitations or by only nonpoint sources. Pet. App. 70a. The court concluded:

> For every substandard navigable river or water, Congress sought a determination whether the central innovation of the 1972 Act—technology driven limits on effluent—would be sufficient to achieve compliance. If not, the river or water was required to go on a list of unfinished business and a TMDL calculation was required.

Ibid. The district court rejected the plaintiffs' claim that the Garcia River TMDL trenched on state authority, observing that the CWA "conferred a large degree of discretion on the states in how and to what extent to implement the TMDLs for nonpoint sources." *Id.* at 71a.

The court of appeals affirmed the district court's decision. The court of appeals noted that, regardless of the degree of deference owed to EPA's interpretation, the government's construction is "more than sufficiently supported by the statutory materials." Pet. App. 20a. The court concluded that the language of Section 303(d)(1), particularly when viewed in context, compels the conclusion that a Section 303(d)(1) list must include all substandard waters, regardless of whether they are subject to point source pollution. *Id.* at 20a-24a. The court noted that Section 303(d) "is structurally part of a set of provisions governing an interrelated goal-setting, information-gathering, and planning process that, unlike many other aspects of the CWA, applies without regard to the source of pollution." *Id.* at 26a. "Looking at the statute as a whole," the court

concluded that "EPA's interpretation of § 303(d) is not only entirely reasonable but considerably more convincing than the one offered by [petitioners] in this case." *Id.* at 28a-29a.

The court also rejected the claim that EPA's establishment of TMDLs for waters impaired solely by nonpoint sources constituted regulation of land use. The Garcia River TMDL, the court observed, identifies "the maximum load of pollutants that can enter the Garcia River from certain broad categories of nonpoint sources if the river is to attain water quality standards," but it does not dictate the measures the State should take to implement the TMDL. Pet. App. 29a. The TMDL is an "informational tool" to assist the State in creating its plan to implement its water quality standards, and not a regulation of private activity. *Id.* at 30a. "California chose both *if* and *how* it would implement the Garcia River TMDL." *Ibid.* Accordingly, the court held that EPA did not exceed its authority in identifying the Garcia River pursuant to Section 303(d)(1) and establishing the Garcia River TMDL. *Ibid.*

ARGUMENT

The court of appeals correctly held that EPA has authority, under Section 303(d) of the CWA, to establish a TMDL for the Garcia River, because the river does not satisfy the State of California's water quality standards. Pet. App. 31a. That decision does not conflict with any decision of this Court or another court of appeals and does not present an issue otherwise warranting this Court's review.

1. Petitioners contend that the court of appeals' decision "conflicts with this Court's precedents barring deference to an agency's statutory construction where the textual meaning is clear." Pet. 7. Petitioners

further assert that "the Ninth Circuit impermissibly determined that it must defer to EPA before analyzing the meaning of the statute." *Ibid.* That contention is incorrect. The Court did discuss, at the outset of its legal analysis, the general principles of deference that would govern the case, but it did not conclude on the basis of that discussion that EPA's interpretation should be upheld. See Pet. App. 12a-20a. Rather, after outlining those principles and identifying where EPA had articulated its administrative interpretation, the court then proceeded to construe Section 303(d) through the traditional tools of statutory interpretation. It comprehensively reviewed the language and purpose of the specific statutory provisions at issue, the statutory scheme as a whole, and the relevant legislative history. Pet. App. 20a-29a. The court concluded, on the basis of those materials, that "the CWA is best read to include in the § 303(d)(1) listing and TMDLs requirements waters impaired only by nonpoint sources of pollution." *Id.* at 31a.

"In the end," the court concluded "it does not much matter in this case whether we review the EPA's position through the *Chevron* or *Skidmore/Mead* prism," because EPA's construction is "more than sufficiently supported by the statutory materials." Pet. App. 20a. The court ultimately relied on deference principles only as an alternative or supplemental rationale, stating:

> Moreover, to the extent the statute is ambiguous —which is not very much—the substantial deference we owe the EPA's interpretation, under either *Chevron* or *Skidmore*, requires that we uphold the agency's more than reasonable interpretation.

Id. at 31a. Accordingly, petitioners' contention that the

court improperly deferred to EPA's construction is without merit.

Petitioners further contend (Pet. 8-16) that EPA's construction of Section 303(d) is contrary to the statute's text. The court of appeals considered and correctly rejected petitioners' arguments. Petitioners' central contention is that, when Congress directed each State to "identify those waters within its boundaries for which the [CWA's] effluent limitations * * * are not stringent enough to implement any water quality standard applicable to such waters," 33 U.S.C. 1313(d)(1)(A), it meant that each State was to examine only those waters that are currently polluted by point sources subject to effluent limitations. See Pet. 8. As both courts below recognized, Congress instead directed each State to examine all waters within its boundaries to determine whether the CWA's effluent limitation program was sufficient in each individual case to achieve compliance with the applicable water quality standards. Pet. App. 21a-22a, 70a.

As the courts below recognized, the CWA's effluent limitations "are not stringent enough" to implement the water quality standards for a polluted water body if, as in the case of the Garcia River, those limitations do nothing to achieve the CWA's goal of attaining the applicable water quality standards. See Pet. App. 21a-22a. That common-sense understanding of Section 303(d)(1)'s text is consistent with "its statutory context," which envisions that a State will identify the navigable waters within its boundaries and then exclude those waters that will attain the applicable water quality standards through application of effluent limitations, "leaving all those waters for which that technology will not 'implement any water quality

standard applicable to such waters.'" *Id.* at 22a (quoting 33 U.S.C. 1313(d)(1)(A)); see *id.* at 52a-53a.[1]

Petitioners' "odd reading of the statute" is inconsistent with the CWA's statutory scheme, taken as a whole. Pet. App. 22a, 25a-29a. The CWA is designed to achieve "the eventual attainment of state-defined water quality standards," which "do not depend in any way upon the source of pollution." *Id.* at 25a. As the court of appeals observed:

> Nothing in the statutory structure—or purpose—suggests that Congress meant to distinguish, as to § 303(d)(1) lists and TMDLs, between waters with one insignificant point source and substantial nonpoint source pollution and waters with only nonpoint source pollution. Such a distinction would, for no apparent reason, require the states or the EPA to monitor waters to determine whether a point source had been added or removed, and to adjust the § 303(d)(1) list and establish TMDLs accordingly. There is no statutory basis for con-

---

[1] Had Congress "intended TMDLs to apply only to waters impaired by point sources" (Pet. 14), it could have said precisely that. For example, Congress made clear that Section 304(*l*)(1)(B) of the CWA applies only to waters impaired entirely or substantially by toxic pollutants discharged from point sources. See 33 U.S.C. 1314(*l*)(1)(B) (requiring States to submit to EPA "a list of all navigable waters in such State for which the State does not expect the applicable standard under section 1313 of this title will be achieved after the requirements of sections 1311(b), 1316, and 1317(b) of this title are met, due entirely or substantially *to discharges from point sources* of any toxic pollutants listed pursuant to section 1317(a) of this title") (emphasis added). Section 303(d) contains no such limiting language, which indicates that no such limitation was intended. See *City of Chicago* v. *Environmental Def. Fund*, 511 U.S. 328, 337 (1994).

> cluding that Congress intended such an irrational regime.

Id. at 28a. Indeed, the CWA contains provisions encouraging States to develop programs to identify and manage nonpoint source pollution. See 33 U.S.C. 1288, 1329. As the court of appeals recognized, the development of TMDLs provides the States with crucial information for addressing nonpoint source pollution under state law. Pet. App. 29a-31a. See pp. 13-15, *infra*.[2]

Petitioners' further claim (Pet. 16-18) that EPA's construction is "unreasonable" is without merit. The court of appeals specifically rejected petitioners' contention that EPA "has not consistently interpreted the statute." Pet. App. 17a. The court of appeals correctly pointed out that the "first regulations promulgated after the enactment of the CWA in 1972 quite clearly required the identification on § 303(d)(1) lists of waters polluted only by nonpoint sources." *Ibid.*; see *id.* at 17a-18a. Since that time, "the agency has consistently interpreted the provisions at issue." *Id.* at 19a-20a. See *id.* at 19a, 67a-68a & n.17.

2. Petitioners incorrectly claim (Pet. 19-24) that the ruling below "conflicts with relevant decisions of this Court." To the contrary, this Court has never had any occasion to address whether Section 303(d)'s listing and

---

[2] Petitioners cite legislative history (Pet. 14) stating that, when effluent limitations prove inadequate to implement the water quality standards, point sources may be required to meet more stringent control requirements. As the court of appeals properly recognized, that legislative history in no way suggests that Congress intended that only waters polluted by point sources would be subject to the TMDL process. Pet. App. 29a. Cf. *Moskal* v. *United States*, 498 U.S. 103, 111 (1990); *Pension Ben. Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 649 (1990); *United States* v. *Turkette*, 452 U.S. 576, 591 (1981).

TMDL requirements apply to waters polluted solely by nonpoint sources. Indeed, as petitioners appear to concede, the issue is one of first impression that has produced no conflict among the courts of appeals.

Petitioners predicate their claim of a conflict on general statements from this Court's decisions in *EPA* v. *California*, 426 U.S. 200, 204-205 & n.12 (1976), and *PUD No. 1 of Jefferson County* v. *Washington Department of Ecology*, 511 U.S. 700, 712-713 (1994), that merely observe that water quality standards may provide a basis for additional point source controls. See Pet. 19-20. Those decisions do not suggest, much less hold, that water quality standards or TMDLs serve only that purpose. Indeed, decisions of this Court that petitioners do not cite recognize that the CWA has a considerably broader scope than petitioners acknowledge. See, *e.g.*, *Arkansas* v. *Oklahoma*, 503 U.S. 91, 99-103 (1992).

There is no merit in petitioners' further contention (Pet. 21) that the court of appeals' decision is inconsistent with statements of this Court recognizing the States' preeminent role in controlling nonpoint source pollution. The court of appeals recognized that the CWA preserves the States' primary responsibility for controlling nonpoint sources. See Pet. App. 5a, 9a, 29a-30a. There is also no merit to petitioners' suggestions (Pet. 22-24) that the court of appeals interpreted Section 303(d) as authorizing EPA to supplant state regulation of land use and that the court's decision is, for that reason, in contravention of *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001). EPA's TMDL for the Garcia River contained no site-specific prescriptions. Instead, it identified broad categories of controllable sediment sources (*e.g.*, mass wasting from roads) and

calculated for each category a sediment allocation and target reduction, leaving to California the determination of what, if any, pollution control measures are appropriate. See Pet. App. 29a-30a, 38a, 69a. In short, EPA's issuance of the TMDL in no way impinged on California's sovereignty. See *id.* at 29a-30a.

To the contrary, the TMDL program reflects the "partnership between the States and the Federal Government" that underlies the CWA as a whole. See *Arkansas*, 503 U.S. at 101. As the State of California noted in support of EPA's position in this case, the CWA's TMDL program "provides the information so that States can make informed water quality decisions, but does not usurp that decision-making power. By empowering States, this process actually enhances state and local control." Cal. Dist. Ct. Amicus Br. 9-10 (filed Feb. 18, 2000). EPA did not engage in any "strong-arm behavior" (Pet. 24) requiring California to implement the TMDL. Indeed, the CWA's only mechanism for encouraging State implementation of nonpoint source loading reductions identified in TMDLs is through the constitutionally permissible action of providing grants under Section 319, 33 U.S.C. 1329, to assist States in controlling nonpoint source pollution. Pet. App. 5a, 30a. See *New York* v. *United States*, 505 U.S. 144, 167 (1992).

3. Petitioners contend (Pet. 25-28) that this case presents a matter of such exceptional importance that it warrants review by this Court, even though no other court of appeals has ruled on the question presented. That contention, which rests on a vast overstatement of the significance of this case, is without merit.

First, petitioners are wrong in characterizing the TMDL program as blurring the line between federal and state authority and posing impermissible burdens

on the States. See Pet. 26-28. Indeed, a group of seven States, including California, filed an amicus curiae brief in the court of appeals supporting EPA's construction, stating:

> [T]he "TMDL" program * * * is the most important federal program currently in place to assist the States in addressing water pollution caused by non-point sources. In California, like other States, approximately half of the impaired rivers, lakes and other waters are exclusively polluted by non-point sources * * *. While the States have primary responsibility for regulating those who are polluting our waters, the assistance of the federal government is critical in laying the foundation for this endeavor.

State Amici Curiae Br. 1.

There is also no merit to petitioners' contention (Pet. 27-28) that the development of TMDLs will necessarily result in a costly program of nationwide nonpoint source pollution controls. The CWA preserves each State's discretion to determine whether, and to what extent, nonpoint source pollution should be controlled. The States, with EPA's assistance, are voluntarily undertaking those responsibilities. It is precisely because cleaning up polluted waters can be costly that all available tools—including TMDLs–should be available to the States to assist them in making reasonable and equitable decisions on how to exercise their responsibilities under state law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

THOMAS L. SANSONETTI
Assistant Attorney General

GREER S. GOLDMAN
RONALD M. SPRITZER
Attorneys

MAY 2003

MOTION FILED
MAY 16 2003

(6)

No. 02-1186

In the

Supreme Court of the United States

GUIDO A. PRONSOLINO, et al.,

Petitioners,

v.

WAYNE NASTRI, Regional Administrator, U.S. Environmental Protection Agency Region 9, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF FOREST LANDOWNERS OF CALIFORNIA, OREGON LANDS COALITION, AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

ROBIN L. RIVETT
Counsel of Record
M. REED HOPPER
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932
Counsel for Amici Curiae Forest Landowners of California, Oregon Lands Coalition, and Pacific Legal Foundation

28 pp

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), Forest Landowners of California (FLC), Oregon Lands Coalition (OLC), and Pacific Legal Foundation (PLF) respectfully move to file this brief amicus curiae in support of the Petition for Writ of Certiorari. Written consent for amicus participation in this case was granted by counsel of record for Petitioners and all Respondents except for Pacific Coast Federation of Fishermen's Associations, et al., and Association of Metro Sewage Agencies.[1]

INTEREST OF AMICI CURIAE

The Forest Landowners of California is a nonprofit association representing the interests of nonindustrial timberland owners throughout the state. The California Department of Forestry estimates there are over 30,000 nonindustrial forest properties (larger than 40 acres) in California, which account for about half of the private timberland in the state. Most of these entities are small, family-owned enterprises.

FLC's members engage in silvicultural activities that can create sediment which during rainstorms may enter streams as runoff. This is called nonpoint source pollution. California has developed a planning program funded and encouraged by the federal Clean Water Act (CWA), Sections 208 and 319, 33 U.S.C. §§ 1288 and 1329, that promotes methods of land use to keep the waters clear of such pollution. Under this state program timberland owners must employ the best management practices set out in California's own water quality regulations. *See* Cal. Pub. Res. Code §§ 4514.3, 4516.5, 4562.7. In fact, California has an elaborate system of water quality regulation.

---

[1] Letters evidencing such consent have been filed with the clerk of the Court.

See also Cal. Fish & Game Code § 5650, *et seq.*, and Cal. Water Code § 13000, *et seq.* (Porter-Cologne Water Quality Control Act). However, as highlighted in this case, EPA has imposed an additional but unauthorized set of regulatory burdens through Section 303(d) of the CWA that seriously hampers FLC's members' ability to carry out their timber-related businesses.

Most of the small family businesses represented by FLC depend entirely upon the income from their low-impact timber harvesting activities to pay for living expenses, retirement, family, estate taxes, and college and educational needs. Increased operational costs resulting from Section 303(d) related restrictions have the potential to cause serious economic harm to FLC's members and the over 30,000 small timberland owners in California.[2]

Oregon Lands Coalition is a nonprofit Oregon corporation consisting of a statewide network of nearly 60 groups and associations. They share a common purpose of ensuring that public policy decisionmaking carefully considers the broad impacts environmental regulations have on landowners and communities as a whole. OLC's member groups include the Oregon State Farm Bureau, the Association of Oregon Loggers, the Oregon Sheep Growers, the Oregon Cattlemen's Association, the Oregon State Grange, and others. These associations represent the interests of thousands of individuals throughout Oregon.

For example, the Oregon State Farm Bureau has represented farmers, ranchers, and small timber owners for the past 77 years. Its more than 20,000 members represent one of the largest blocks of private landowners in Oregon. Because of

---

[2] For example, three of the plaintiffs in this case are small timberland owners in Northern California. Due to these increased operational restrictions on where and when they may harvest their own trees, they have suffered additional costs of over $12 million.

the climate and geography that prevail there, many farms and ranches contain not only crop and grazing land, but also forest land. Each of these agricultural uses will be faced with costly land use restrictions as a result of the Ninth Circuit's decision below, just like the Petitioners in this case.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Litigating nationwide since 1973, PLF provides a voice in the courts for thousands of Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF is headquartered in Sacramento, California, and has offices in Coral Gables, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska. PLF has participated in numerous cases across the country concerning the interpretation of the Clean Water Act and its restrictions on landowners' rights to use their private property in a reasonable, productive manner.[3]

In separate appellate litigation also concerning the application of Section 303(d), PLF attorneys are currently representing several farmers and agricultural organizations. *Hawes v. Oregon*, Oregon Circuit Court for Baker County, Docket No. 00-198. The plaintiffs are challenging a highly restrictive state water pollution control program, adopted in mistaken reliance on the Ninth Circuit's ruling in this case that Section 303(d) applies to streams even though they do not have point sources of pollution. On December 7, 2002, the Oregon trial court ruled that Section 303(d) imposed restrictions do not

---

[3] For example, PLF participated recently as amicus curiae before the United States Supreme Court in *Borden Ranch Partnership v. United States Army Corps of Engineers*, 123 S. Ct. 599 (2002), and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), both of which concerned the scope of authority granted to the Army Corps of Engineers and EPA under the federal Clean Water Act.

apply to streams with only nonpoint sources of pollution, e.g., agricultural runoff. The decision squarely conflicts with the Ninth Circuit's decision in this case. *See Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002).

But, if the Oregon Court of Appeals capitulates to the Ninth Circuit's decision herein, agricultural activities may be shut down on significant stretches of land. For instance, client Daryl Hawes produces livestock on both sides of the Burnt River in Baker County, Oregon. The river has no point sources of pollution, but due to its 303(d) listing, it is expected that agriculture will be prohibited from taking any actions that might increase the river's temperature in any amount. To comply, Hawes will not be able to use river water to irrigate his crops and water his cattle at certain times of the year when the volume and flow rate of the river need to be maintained to keep it cool. Without access to the River to water his cattle and irrigate his crops, he will have to develop other costly water resources, or change his land use to other less valuable crops or uses that need less water. As a result, the value of his land has already plummeted and he faces an uncertain future.[4]

Amici will augment Petitioners' arguments by showing that the Ninth Circuit's decision ignores the principles of federalism upon which the Clean Water Act is based. Amici

---

[4] Numerous people similarly situated to the Hawes can also expect similar injuries. Just in California alone more than *15 million acres of land* would be affected by Section 303(d) restrictions attributable to nonpoint source-only pollution. California State Water Resources Control Board, *Staff Report: Revision of the Clean Water Act Section 303(d) List of Water Quality Limited Segments* (2003), *available at* http://www.swrcb.ca.gov/tmdl/docs/staff_report303d_vol1_011303.pdf. All farms, ranches, and timber operations within the jurisdiction of not only California, but the entire Ninth Circuit, are subject to massive restrictions that can actually *prohibit* landowners from farming, grazing, or harvesting their land or even preparing their land for these activities.

will explain how the plain language and comprehensive legislative history of the Act demonstrate Congress's clear intent that states, not the federal Environmental Protection Agency (EPA), are to be in control of regulating land use activities that may affect water quality. Unfortunately, the Ninth Circuit's decision allows EPA to micromanage rural land uses stripping states of their primary regulatory role over land, and subjecting landowners to severe regulatory mandates that may even force some to shut down their farming, ranching, and forestry operations.

For all the foregoing reasons, the motion of Forest Landowners of California, Oregon Lands Coalition, and Pacific Legal Foundation to file a brief amicus curiae should be granted.

DATED: May, 2003.

Respectfully submitted,

ROBIN L. RIVETT
Counsel of Record
M. REED HOPPER
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932
Counsel for Amici Curiae
Forest Landowners of California,
Oregon Lands Coalition, and
Pacific Legal Foundation

QUESTIONS PRESENTED

Section 303(d)(1) of the Clean Water Act, 33 U.S.C. § 1313(d)(1), requires each State to identify those waters within its boundaries for which specified "effluent limitations . . . are not stringent enough to implement any water quality standard applicable to such waters," and to establish total maximum daily loads (TMDLs) of pollutants for those waters. Although effluent limitations are by definition applicable only to waters impaired by point sources, the Environmental Protection Agency (EPA) requires each State to identify and establish TMDLs for all its waters not meeting water quality standards, including waters not impaired by point sources and thus not subject to effluent limitations at all. On that basis, EPA imposed TMDLs on numerous California waters impaired only by nonpoint sources. The questions presented are:

1. Whether § 303(d)(1) requires a State to identify and establish TMDLs for all substandard waters within its boundaries, including those impaired only by nonpoint sources.

2. Whether permitting EPA to establish TMDLs for waters impaired only by nonpoint sources and thereby impose corresponding land use controls constitutes an impermissible federal intrusion into a core State function without a clear statement from Congress.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

THE NINTH CIRCUIT'S DECISION EVISCERATES CONGRESS'S INTENT TO PRESERVE THE STATES' AUTHORITY OVER WATER POLLUTION REGULATION THAT DICTATES LAND USE CHOICES AND RAISES AN IMPORTANT QUESTION CALLING FOR THIS COURT'S REVIEW 2

A. The CWA's Plain Language Reserves Land and Water Use Decisions to the States 2

B. Congress Did Not Intend That TMDLs Would Apply to Waters Affected Only by Nonpoint Sources of Pollution 7

C. The Ninth Circuit's Decision Strips States of Their Primary Role over Land and Water Use, Raising Serious Federalism Issues 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Cases

FERC v. Mississippi, 456 U.S. 742 (1982) 14

Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30 (1994) 15

Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981) 14

National Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988) 3

Natural Resources Defense Council v. United States EPA, 16 F.3d 1395 (4th Cir. 1993) 3-4

Oregon Natural Resources Council v. Lyng, 882 F.2d 1417 (9th Cir. 1989), *modified*, 899 F.2d 1565 (9th Cir. 1990) 3

Pronsolino v. Marcus, 91 F. Supp. 2d 1337 (N.D. Cal. 2000) 13

Pronsolino v. Nastri, 291 F.3d 1123 (9th Cir. 2002) 13

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) 2, 13-15

South Dakota v. Dole, 483 U.S. 203 (1987) 13

Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000) 14

Statutes

33 U.S.C. § 1251(b) 5, 7-8, 15

§ 1288 4

TABLE OF AUTHORITIES—Continued

Page

§ 1288(a) 12

§ 1288(b) 12

§ 1288(b)(2)(F)-(I) 12

§ 1288(g)-(j) 12

§ 1311 3

§ 1311(b) 6

§ 1311(b)(1)(A) 8

§ 1311(b)(2)(A) 8

§ 1313(d) 8

§ 1313(d)(1) 4

§ 1313(d)(1)(A)-(C) 5-6

§ 1329 ..... 4, 11

§ 1342 8

§ 1342(a)-(d) 3

§ 1362(11) 3, 6

§ 1362(14) 3

Regulation and Rule

40 C.F.R. § 130.2(h) (2003) 4

Sup. Ct. R. 37.6 1

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

Conf. Rep., Federal Water Pollution Control Act Amendments of 1972, S. Rep. No. 92-1236 (1972), *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1 (Comm. Print 1973) 10-11

Continuing House Deb. on H.R. 11896, Mar. 28, 1972, *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1 (Comm. Print 1973) ... 10

Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (1948) 7

Hale, Mandi M., *Comment: Pronsolino v. Marcus, The New TMDL Regulation, and Nonpoint Source Pollution: Will the Clean Water Act's Murky TMDL Provision Ever Clear the Waters?*, 31 Envtl. L. 981 (2001) 10

House Consideration of the Rep. of the Conf. Comm., Oct. 4, 1972, *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1 (Comm. Print 1973) 11

House Rep., Fed. Water Pollution Control Act Amendments of 1972, S. Rep. No. 92-911 (1972), *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1 (Comm. Print 1973) 9

TABLE OF AUTHORITIES—Continued

Page

S. Consideration of the Rep. of the Conf. Comm., Oct. 4, 1972, presentation by Sen. Muskie, *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1 (Comm. Print 1973) 7-8, 11

Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965) 7

White, L., *The States and the Nation* (1953) 14

INTEREST OF AMICI CURIAE[1]

The interests of Amici Curiae Forest Landowners of California, Oregon Lands Coalition, and Pacific Legal Foundation are set forth in the preceding motion.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision ignores the principles of federalism upon which the Clean Water Act's (CWA) strategy to clean the Nation's waters was based. Specifically, the decision conflicts sharply with the division of responsibilities Congress outlined between the Environmental Protection Agency (EPA) and the states. In crafting the CWA, Congress envisioned a structure in which EPA would act primarily as an oversight and support agency for *state* regulatory efforts directed at nonpoint source water pollution control. Though EPA's role is critical in establishing nationwide goals and standards, its direct regulatory power is limited. Instead, Congress intended that states take the lead in implementing the goals and policies of the Act, and in so doing would have exclusive control over land use policies.

One particular feature of this cooperative structure in deferring to state control over land use is the explicit distinction Congress drew between point and nonpoint sources of pollution. Specifically, Congress focused EPA's regulatory authority on controlling point-source discharges. With the exception of imposing limited conditions on the provision of federal funding, Congress left nonpoint source regulation to the states.

But EPA's new interpretation of Section 303(d) of the CWA, as upheld by the Ninth Circuit, would upset the federal-

---

[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation of submission of this brief.

state division of responsibilities that Congress created. By injecting itself into the micromanagement of land uses that is central to addressing waters affected only by nonpoint sources of pollution, EPA has set itself up as a sort of super land use planning agency that has ultimate authority over all local land use decisions that may in some way affect water quality. This is an outcome that stands the CWA on its head. It strips states of their appropriate water quality planning role under the Act and their long-held, traditional and primary power over land use planning. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 173 (2001) (*SWANCC*). Accordingly, this is a very important case that should be reviewed by this Court.

ARGUMENT

THE NINTH CIRCUIT'S DECISION EVISCERATES CONGRESS'S INTENT TO PRESERVE THE STATES' AUTHORITY OVER WATER POLLUTION REGULATION THAT DICTATES LAND USE CHOICES AND RAISES AN IMPORTANT QUESTION CALLING FOR THIS COURT'S REVIEW

This case raises an important issue: May the Ninth Circuit allow the constitutionally designed *federal* structure of our Nation to be undermined by an administrative agency's misreading and overzealous application of a federal statute? In this case, the Ninth Circuit succumbed to EPA's quest for more power, but in so doing subverted Congress's promise that in addressing water pollution states would retain their traditional, primary role over land and water use planning. The Ninth Circuit's decision below ignores this promise.

A. The CWA's Plain Language Reserves Land and Water Use Decisions to the States

The federal CWA was adopted to control the amount of pollution entering the Nation's waters. It divides sources of

water pollution into categories by the way it is introduced into receiving waters. *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 582 (6th Cir. 1988). The first category consists of the discharge of pollutants from a "point source." Point source is defined as "any discernible, confined and discrete conveyance," and includes such things as a pipe, ditch, or channel. 33 U.S.C. § 1362(14). The second category consists of pollution that comes from a "nonpoint source." The CWA does not define "nonpoint source," but it has been construed as "any source of water pollution or pollutants not associated with a discrete conveyance . . . includ[ing] runoff from fields [and] forests." *Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417, 1424 n.8 (9th Cir. 1989), *modified*, 899 F.2d 1565 (9th Cir. 1990).

Under the regulatory scheme of the CWA, point source pollution is prohibited unless EPA, or the state via an EPA-approved program, has issued a permit (33 U.S.C. § 1311) specifying pollutant discharge conditions and restrictions. 33 U.S.C. § 1342(a)-(d). The permit typically contains numerical limits on the amounts of specified pollutants the permittee may discharge into navigable waters. The limits are known as "effluent limitations" which by definition apply only to point source discharges. 33 U.S.C. § 1362(11). This scheme also requires a state to identify as impaired those waters for which the "effluent limitations" are not stringent enough to meet the applicable state-imposed water quality standards[2] and establish

---

[2] [T]he CWA requires each state to adopt water quality standards for all waters of that state and to review them at least every three years. *Id.* §§ 1313(a), (b), (c)(1) (1982 & Supp. 1993). To adopt these standards, states must first classify the uses for which the water is to be protected, such as fishing and swimming, and then . . . determine the level of water quality necessary to protect those uses. Thus, the following three factors are considered when adopting or

(continued...)

Total Maximum Daily Loads, or TMDLs, for the pollutants entering those affected waters. CWA, Section 303(d)(1), 33 U.S.C. § 1313(d)(1); 40 C.F.R. § 130.2(h) (2003).

Nonpoint source pollution is dealt with in a different manner. Section 208 of the CWA, 33 U.S.C. § 1288, gave states the responsibility to draft area wide waste treatment management plans for identifying sources of nonpoint pollution and establishing best management practices to control such pollution. The Act provided financial incentives for nonpoint sources to adopt best management practices but did not penalize anyone for failing to do so. In 1987, Section 319, 33 U.S.C. § 1329, was added providing new grant opportunities to states which had complied with the nonpoint source reporting and planning goals established by Section 319.

Section 303(d)(1) of the CWA, 33 U.S.C. § 1313(d)(1), is the focus of this case. It requires states to identify as impaired certain water bodies that have not met state water quality standards and then establish TMDLs for the pollutants that are causing those water bodies not to meet their standards. The critical question advanced in this case is whether Congress ever intended that those waters affected only by nonpoint sources of pollution, i.e., farming, forestry, be listed as impaired and have mandatory TMDLs assigned to them. The reason this question

---

[2] (...continued)

evaluating a water quality standard: (1) one or more designated uses of the state waters involved; (2) certain water quality criteria, expressed as numeric pollutant concentration levels or narrative statements representing a quality of water that supports a particular designated use; and (3) an antidegradation policy to protect existing uses and high quality waters. *Id.* § 1313(c)(2)(A) (Supp. 1993); 40 C.F.R. § 131.

Natural Resources Defense Council v. United States EPA, 16 F.3d 1395, 1400 (4th Cir. 1993).

has practical and constitutional importance[3] is that if the answer is yes, the only way the federally mandated TMDLs can be met is to change land use practices. In other words, despite Congress's promises to the contrary, states will be forced by EPA to eliminate or change land uses as the only way to reduce pollutant levels in these waters.

Stripping the wheat from the chaff, the fundamental issue is this: Does Section 303(d)(1) of the CWA grant EPA authority to mandate TMDLs for water bodies affected only by nonpoint source runoff? The plain language of Section 303(d)(1) expressly assigns to states the responsibility to establish TMDLs only for waters that receive "effluents" which by definition come singularly from *point* sources. The Section reads:

> (A) Each State shall identify those waters within its boundaries *for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title* are not stringent enough to implement any water quality standard applicable to such waters. . . .
>
> . . . .
>
> (C) Each State shall establish *for the waters identified in paragraph (1)(A) of this subsection* . . . the total maximum daily load, for those pollutants which the Administrator identifies . . . as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards . . . .

---

[3] The Ninth Circuit's decision raises serious concerns about federal intrusion into state affairs "to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b).

33 U.S.C. § 1313(d)(1)(A)-(C) (emphases added). Sections 1311(b)(1)(A) and (B), referenced in Section 1313(d)(1), state, respectively:

> (b) . . . In order to carry out the objective of this chapter there shall be achieved—
>
> (1)(A) not later than July 1, 1977, *effluent limitations for point sources*, other than publicly owned treatment works . . . .
>
> (B) for publicly owned treatment works in existence on July 1, 1977 . . . *effluent limitations* based upon secondary treatment . . . .

33 U.S.C. § 1311(b) (emphases added). The term "effluent limitation" is defined in the CWA as:

> [A]ny restriction established by a State or the [EPA] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents *which are discharged from point sources* . . . .

33 U.S.C. § 1362(11) (emphasis added). Thus, as written, it is patently clear that Sections 1311(b)(1)(A) and (B) can apply *only* to point sources of pollution. Nevertheless, the Ninth Circuit's decision below not only dismissed this express language, but also the historical underpinnings of the CWA and states' traditional responsibility under our federal system of government to plan the development and use of land and water. Any doubt as to what the language of Section 303(d)(1) means is dispelled by reviewing the history of the Clean Water Act and recognizing that no deference may be given to the Ninth Circuit's interpretation which extinguishes the traditional and constitutionally designed role of states over land use control.

B. Congress Did Not Intend That TMDLs Would Apply to Waters Affected Only by Nonpoint Sources of Pollution

The Federal Water Pollution Control Act first adopted in 1948, Pub. L. No. 80-845, 62 Stat. 1155 (1948), and as amended by the Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965), was an initial effort to clean our Nation's waters by having the states establish water quality standards[4] for their waters, and providing courts authority to grant relief from nuisance-like pollution after considering the practicability and economic feasibility of abatement. But the approach of each state simply setting water quality standards and coupling that with a fairly weak enforcement system was ineffective. It was just too difficult to determine what individual discharger or pollution source was the ultimate cause of exceeding the water quality standard; moreover state water quality programs were severely underfunded. *See generally* S. Consideration of the Rep. of the Conf. Comm., Oct. 4, 1972, presentation by Sen. Muskie, *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1 at 164-65 (Comm. Print 1973).

As a result of this need to change the way it approached water pollution, Congress adopted the Federal Water Pollution Control Act of 1972. Congress made it clear, however, that while the strategy would change, the primary role of the states would not. In the preamble to the 1972 Act, Congress emphasized this deference stating:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources, and to

---

[4] *See* n.2, *supra*, at 3-4.

> consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b). This was a central theme of the 1972 Act; the federal government would not arrogate to itself the traditional responsibilities and roles of the states. But Congress also knew some strategy changes were needed to reduce water pollution. As such, Congress expressly addressed point source pollution with a new approach: advanced mandated *technological* controls.

In an attempt to avoid economic dislocation, Congress took a stepped approach to achieving the goals of the CWA and set a national goal that by January 1, 1976, all point source controls would be required to comply with "the best practicable control technology currently available." 33 U.S.C. § 1311(b)(1)(A). That is, any factory or plant discharging effluent from a point source into the Nation's waters was given a deadline by which to employ technologically available and affordable pollutant control systems. This standard was enforced through the Act's permitting scheme, outlined in Section 402 of the Act (33 U.S.C. § 1342). By January 1, 1981, all point sources had to employ a stricter standard of effluent control: "best available technology." 33 U.S.C. § 1311(b)(2)(A). This provision required effluent dischargers to use the best technology developed for controlling pollutant discharges, virtually regardless of cost. The hope was that these long-range requirements would encourage the development of affordable and effective technologies to address effluent discharges, and allow the economic activities of the Nation to continue with minimal disruption. *See, e.g.*, S. Consideration of the Rep. of the Conf. Comm., *in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, *supra*, at 169-70.

Congress also adopted in 1972 Section 303(d), 33 U.S.C. § 1313(d), to further enhance the likelihood that the Act's

controls on point source discharges of pollution would succeed in cleaning the Nation's waters. First, water quality standards were promulgated pursuant to Section 303(d) as a goal against which to measure the amount of pollution reduction success *point source* controls had achieved. Second, in the event goals had not been achieved and such waters remained impaired, the standards were a basis to establish yet more stringent effluent limitations further reducing the pollutant load levels discharged from point sources. The House Report to H.R. 11896, which introduced Section 303(d) to the CWA's legislative process, explained:

> Subsection (d)(1) of section 303 requires each State to identify . . . those waters . . . for which the effluent limitations required for non-publicly owned point sources and for publicly owned treatment works . . . are not stringent enough to implement any water standard applicable to such waters. . . .
>
> The State shall establish from any waters so identified . . . the total maximum daily load [TMDL] . . . .

House Rep., Fed. Water Pollution Control Act Amendments of 1972, S. Rep. No. 92-911, at 106 (1972), *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1, at 793 (Comm. Print 1973). Given that the House Bill was the origin of TMDLs, it is telling that the House Report explained Section 303(d) exclusively in terms of point source controls. There is no indication that the water quality standards imposed by Section 303(d) were intended to be directed at nonpoint sources.

Specifically, the purpose of TMDLs was to provide a backstop standard for point source controls: to ensure that, first, the point source control program was working, and, second, even if point source dischargers were already complying with the mandates of Sections 301(b)(1)(A)

and (b)(2)(A) but still not achieving the applicable water quality standards, such dischargers might nonetheless be required to comply with greater control measures.[5] TMDLs were imposed under Section 303(d) to define the amount and kind of pollutants that a given water segment could withstand and still meet applicable water quality standards. Accordingly, the states (or EPA, depending upon who was implementing the Section 402 permitting scheme) could identify which pollutants (or polluters) warranted more stringent effluent controls.

As the Section 303(d) TMDL proposal wound through the legislative process, every congressional statement relating to Section 303(d) explained the provision only in terms of its utility in establishing effluent standards which, as stated *supra* at 9-10, relate only to point source discharges.[6] Thus, these

---

[5] *See* Mandi M. Hale, *Comment: Pronsolino v. Marcus, The New TMDL Regulation, and Nonpoint Source Pollution: Will the Clean Water Act's Murky TMDL Provision Ever Clear the Waters?*, 31 Envtl. L. 981, 996 (2001) (author argues that Section 303(b)(1)(C)'s requirement of more stringent effluent limitations if water quality standards are not met through best practicable control and best available control technologies of Section 301(b)(1)(A) and Section 301(b)(1)(B) are met through imposition of TMDLs).

[6] For example, Congressman Harsha explained:

> [I]ndustry will be on notice now that they . . . have to go beyond [best practicable technology] and assure that the *best practicable technology will meet the water quality standards and the load limits* . . . .

Continuing House Deb. on H.R. 11896, Mar. 28, 1972, *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1, at 524 (Comm. Print 1973) (emphasis added). And, "Subsection (d)(1) requires each State to identify the waters . . . *for which effluent limitations required by section 301 are not stringent enough* to implement a water quality

(continued...)

statements demonstrate that Section 303(d)'s mandate to establish TMDLs on impaired water bodies was intended, understood, and designed for the express purpose of defining more stringent effluent limitations on point source discharges. In fact, Amici could not find a single report or debate that discussed Section 303(d)'s TMDL standard as a means of setting limitations on nonpoint source pollution. Instead, in 1972, nonpoint source pollution control was addressed only under Section 208 of the Act.[7]

In contrast to the CWA's provisions for point source controls, the Act's provisions for nonpoint sources of pollution

---

[6] (...continued)
standard . . . .", Conf. Rep., Federal Water Pollution Control Act Amendments of 1972, S. Rep. No. 92-1236, at 123 (1972), *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1, at 306 (Comm. Print 1973) (emphasis added). Also, "[s]ection 303 contains provisions for the identification of waters *where the technological standards are not stringent enough* to implement applicable water quality standards. *For these waterways*, the States are required to establish load limits . . . ." House Consideration of the Rep. of the Conf. Comm., Oct. 4, 1972, *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1, at 246 (Comm. Print 1973) (emphases added). And finally: "To the extent the *State* may wish to continue an examination of water quality *in order to determine if more restrictive effluent limits may be required*, this section [303] will be useful." S. Consideration of the Rep. of the Conf. Comm., Oct. 4, 1972, *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, *supra*, at 171 (emphases added).

[7] Congress amended the CWA in 1987 also to address nonpoint source pollution in Section 319. There again, nonpoint source pollution control was left in the hands of the states as EPA's role is limited to providing standards, expertise, and funding. *See* 33 U.S.C. § 1329.

contained a distinctly different federal approach. Under the proposed bills, and as finally enacted, Section 208 addressed *state-created plans* for controlling nonpoint sources of pollution and focused the federal role primarily on providing a funding mechanism and expert assistance for developing such plans. The federal *regulatory* role was strictly limited to providing approval of the plans. *See* 33 U.S.C. § 1288(g)-(j).

Of course, like many federal funding measures, Congress did impose conditions upon the states in return for federal funds. Section 208's most fundamental condition is that states must develop and operate a continuing area wide waste management plan. 33 U.S.C. § 1288(b). However, conditions regarding the plan still left it to the states to develop and implement their nonpoint source pollution control programs specifically describing Section 208 as a mechanism for

> (a) . . . *encouraging and facilitating* the development and implementation of areawide waste treatment management plans . . . .

33 U.S.C. § 1288(a) (emphasis added).

In fact, while each plan is to include specific elements, the severity of these elements is subject to the judgment of each state. Specifically, a state's plan is asked to include, *if appropriate*, a series of procedures and methods (including land use requirements) to control certain nonpoint sources of pollution, *to the extent feasible*. *See* 33 U.S.C. § 1288(b)(2)(F)-(I). This deferential approach to *state* pollution control decisions for nonpoint sources stands in stark contrast to the mandatory standards related to point sources.

Overall, the legislative history and plain language of the CWA shows that Congress placed broad discretion in the states to regulate nonpoint source controls, subject only to minimum

federal standards for funding.[8] Contrary to the ruling by the Ninth Circuit, Congress did not authorize EPA to require states to impose the TMDL requirement of Section 303(d) on waters that contain no point sources of pollution. States are therefore governed only by area wide waste management plans under the Section 208 planning process.

C. The Ninth Circuit's Decision Strips States of Their Primary Role over Land and Water Use, Raising Serious Federalism Issues

EPA's grafting of Section 303(d) TMDL mandates onto a state's nonpoint source control program turns the Act on its head and strips from states their traditional and primary role over land use. *SWANCC*, 531 U.S. at 174. In short, EPA's application of Section 303(d) alters the entire nature of the

---

[8] The courts below minimized concerns about the mandatory nature of the Section 303(d) TMDL process by contending that the inclusion of NPS-impaired water bodies under Section 303(d) did not necessarily intrude on state prerogatives to regulate nonpoint sources because "[a] state could even refuse to implement a TMDL . . . although to do so might provoke EPA to curtail or to deny grant money to the state." *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1356 (N.D. Cal. 2000); *Pronsolino v. Nastri*, 291 F.3d 1123, 1140 (9th Cir. 2003) ("States must implement TMDLs only to the extent that they seek to avoid losing grant money . . . ."). *See also* Petition for a Writ of Certiorari at 24 (discussing EPA's warning that failure to implement its TMDLs might prompt the agency to engage in "nasty little tricks" with grants and such). But the provisions of Title II in general—and Section 208 in particular—expressly spell out the conditions Congress imposed on the provision of federal funding. Neither the Ninth Circuit nor EPA has provided any statutory or case authority for the proposition that an agency may conflate a federal Act to make the conditional funding provisions of one part (here, Title II) depend upon compliance with any other provision (here, their interpretation of Title III). Congress, and not executive agencies, has power under the Spending Clause to condition funding. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

Section 208 area wide waste management plan. It is no longer a state plan outlining the *state's* discretionary efforts to reduce nonpoint source discharges, but is now a plan that must include EPA-imposed TMDL mandates. This raises significant constitutional and federalism questions. As explained in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 289 (1981), "forc[ing] States to choose between performing tasks set by Congress and abandoning . . . land use regulation," a "field traditionally reserved to state authority" raises serious Tenth Amendment and federalism concerns. *See FERC v. Mississippi*, 456 U.S. 742, 783 & n.12 (1982) (O'Connor, J., partial concurrence; partial dissent) ("'A federal system implies a partnership, all members of which are effective players on the team and all of whom retain the capacity for independent action. It does not imply a system of collaboration in which one of the collaborators is annihilated by the other.'" (quoting L. White, *The States and the Nation* 3 (1953))). And there is in the CWA "nothing approaching a clear statement from Congress that it intended" to empower the federal government to preempt the entire field of water quality regulation and land use planning. *See SWANCC*, 531 U.S. at 174. Without such a "clear statement," this Court should not permit such a shift in power. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000).

The Ninth Circuit's decision that embraces EPA's expansive interpretation of its power under the CWA, of course raises this same concern about federal intrusion into state affairs. Unlike the Ninth Circuit, however, this Court has noted: "[W]here an administrative interpretation [such as EPA's concerning Section 303(d)] alters the federal-state framework by permitting federal encroachment upon a traditional state power," *SWANCC*, 531 U.S. at 173, such concern is heightened and deference to administrative interpretation is properly rejected. Specifically, the Ninth

Circuit's decision in this case that Section 303(d) allows EPA to take over a state's discretionary nonpoint source pollution prevention planning by mandating TMDLs for waters affected only by nonpoint sources "would result in a significant infringement of the states' traditional and primary power over land and water use." *Id.* at 174. *See Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments."). "Rather than expressing a desire to readjust the federal-state balance [in adopting the CWA], Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .' 33 U.S.C. § 1251(b)." *SWANCC*, 531 U.S. at 174.

But the Ninth Circuit's decision fails to recognize this division of responsibility and strips from the states their primary role in solving land use and water quality problems. This cannot be what Congress intended; certainly, it is not what Congress said. Protection from nonpoint source pollution was to remain in the hands of the states according to Section 208. It was never intended that states would lose their sovereign power over land use decisions and be subjected to EPA control under Section 303(d).

CONCLUSION

By enacting the Clean Water Act, Congress never intended EPA to grab from states their traditional authority to prescribe local land uses to address water quality problems. Under Sections 208 and 319 of the CWA, Congress reserved this role only for states. Nevertheless, the Ninth Circuit's decision shifts this role to EPA by gratuitously expanding EPA's authority under Section 303(d) of the CWA. This arrogation of power

creates a serious federalism problem calling for this Court's review. The Petition for Writ of Certiorari should be granted.

DATED: May, 2003.

Respectfully submitted,

ROBIN L. RIVETT
Counsel of Record
M. REED HOPPER
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932
Counsel for Amici Curiae
Forest Landowners of California,
Oregon Lands Coalition, and
Pacific Legal Foundation

Supreme Court, U.S.
FILED
MAY 23 2003
OFFICE OF THE CLERK

No. 02-1186

In the Supreme Court of the United States

GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO, AS TRUSTEES FOR GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO TRUST; AMERICAN FARM BUREAU FEDERATION; CALIFORNIA FARM BUREAU FEDERATION; MENDOCINO COUNTY FARM BUREAU,

Petitioners,

v.

WAYNE NASTRI, REGIONAL ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 9; CHRISTIE WHITMAN, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

TIMOTHY S. BISHOP
SUSAN E. BRICE
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

JEFFREY W. SARLES
Counsel of Record
RUSSELL R. EGGERT
CRISTINA CARMODY TILLEY
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

Counsel for Petitioners
[Additional counsel listed on inside cover]

JOHN J. RADEMACHER
American Farm Bureau Federation
225 Touhy Avenue
Park Ridge, IL 60068
(847) 685-8600

NANCY N. MCDONOUGH
California Farm Bureau Federation
2300 River Plaza Drive
Sacramento, CA 95833
(916) 561-5500

TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONERS 1

TABLE OF AUTHORITIES

Page(s)

Cases

Chisom v. *Roemer*, 501 U.S. 380 (1991) 9

Dole Food Co. v. *Patrickson*, 123 S. Ct. 1655 (2003) 5

EPA v. *California*, 426 U.S. 200 (1976) 6

Solid Waste Agency v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) 9

Statutes

Clean Water Act, 33 U.S.C. § 1251 *et seq.*:
Section 208, 33 U.S.C. § 1288 6
Section 301(b), 33 U.S.C. § 1311(b) ..... *passim*
Section 303(d), 33 U.S.C. § 1313(d) ..... *passim*
Section 304(a), 33 U.S.C. § 1314(a) 7
Section 319(a), 33 U.S.C. § 1329(a)(2) 3, 5

Other Authorities

43 Fed. Reg. 60662 (1978) 7

50 Fed. Reg. 1774 (1985) 7

EPA, *Section 319 Success Stories Volume III: The Successful Implementation of the Clean Water Act's Section 319 Nonpoint Source Pollution Program* 9

Houck, THE CLEAN WATER ACT TMDL PROGRAM (1999) 8

REPLY BRIEF FOR PETITIONERS

EPA cannot point to any support in the language or legislative history of the Clean Water Act for its extraordinary extension of its authority to waters impaired only by nonpoint sources. It has no answer to the fact that for two decades it consistently interpreted the Act's TMDL program not to reach so far.

Instead, EPA principally contends that EPA-imposed TMDLs are not important enough for this Court to bother with. The government pretends that such TMDLs have no teeth but are mere "informational tools" that "do not impose legal obligations or prohibitions on polluters." U.S. Br. 2-4. EPA does not deny, however, that it legally obligated California to implement the rigorous load limits in EPA's Garcia River TMDL, that the land use controls made necessary by that TMDL have imposed millions of dollars in costs on petitioners and other landowners, or that the 40,000 TMDLs to be implemented over the next decade will cost the States over $1 billion at a time when state deficits are mounting rapidly. See Pet. 27. These are issues of critical importance to landowners, to State and Federal agencies, and to the Nation.

1. The government's portrayal of mandatory TMDLs as benign sources of information is refuted by EPA's own words. EPA's Garcia River TMDL, for example, describes the TMDL process as follows: "Upon establishment of the TMDL by EPA, the State is *required* to incorporate the TMDL, along with appropriate *implementation* measures, into the State Water Quality Management Plan." ER-1 at 6 (emphasis added). Further, the State must "develop and submit an *implementation plan* to EPA" containing "reasonable assurances that the nonpoint source load allocations established in the TMDL [will] in fact be achieved." *Id.* at 43 (emphasis added). These

implementation requirements, which the EPA sets forth in great detail and with precise deadlines in each of its TMDLs, are federal mandates that EPA continuously monitors and that severely restrict the flexibility of state and local governments to address agricultural and forestry run-off and other forms of nonpoint source pollution. See Brief of Respondents American Forest & Paper Association and California Forestry Association 3-4.

2. The government attempts to downplay EPA's unprecedented intrusion into the traditionally State and local domain of land use controls, suggesting (at 5) that TMDLs may be implemented only under "state law." In fact, TMDLs were a creation of the federal 1972 Act, and California law did not even provide for TMDLs when EPA imposed its Garcia River TMDL.

EPA also argues that it has "no authority" to enforce TMDL restrictions or require the States to do so, and that its role is limited to benevolently disbursing funds to "assist" the States. U.S. Br. 5. That portrayal is not supported by the record in this case. EPA's brief conveniently omits any reference to its threat of "nasty little tricks" unless California implemented EPA's Garcia River TMDL as EPA demanded. See ER-86 ¶¶ 21-22; Pet. 4, 24. That TMDL's requirement of a 60% sediment reduction was expressly based on "land management and/or restoration measures." ER-1 at 37. Forcing California to impose land use controls on the Pronsolinos and other landowners may be "assistance" in the government's vocabulary but constitutes coercion under any plausible standard. Such coercion cannot be reconciled with Congress's assignment to the States of primary responsibility over nonpoint source pollution and local land uses.

EPA's attempt to seize control over local land use activities extends far beyond the Garcia River basin. Imposing TMDLs on nonpoint sources of pollution inherently opens the door to widespread EPA control over local land uses because the "sources" of nonpoint source pollution are primarily agricultural and forestry activities. These are activities that Congress consistently has directed the States to address through best management practices and other voluntary mechanisms. See 33 U.S.C. § 1329(a)(1)(C).

It is no answer to say that States may choose how to implement these federal mandates. U.S. Br. 14-15. If the government were to mandate that the height of all buildings be reduced by 10 percent, any State discretion about how to implement that reduction would not make the mandate any less onerous. If a State must reduce sediment loadings to a specified level mandated by EPA, its range of options is exceedingly narrow. And the fact that EPA has been mandating implementation measures as well as allowable loads renders those purported options illusory.

According to the government (at 14-15), the Court need not be concerned about EPA's trampling of the federalist scheme embodied in the Clean Water Act because several States, including California, supported EPA's position below. But, as the government acknowledges (at 6), EPA imposed the Garcia River TMDL after California *refused* to place waters impaired only by nonpoint sources on its § 303(d)(1)(A) list. See ER-86 ¶¶ 3-5; Pet. 4. Moreover, the States have vehemently opposed EPA's efforts to expand TMDLs to reach waters impaired only by nonpoint sources. When EPA proposed its new TMDL regulations incorporating that position (see Pet. 28), objections were voiced by the Environmental Council of the States (of which 52 states

and territories are members), the Association of State and Interstate Water Pollution Control Administrators, and the Coastal States Organization. In comments submitted to EPA, these organizations denied "that USEPA has clear statutory authority for proposed nonpoint source requirements," explaining that "the requirement to include waterbodies solely impacted by nonpoint sources on the 303(d) list is a strained interpretation of Section 303(d)(1)(A)."[1] The fact that certain States, in the wake of the decisions below and in the face of EPA's "nasty little tricks with grants and such," have been forced to accede to EPA's demands does not make EPA's position and conduct any less coercive or this issue any less important.

3. EPA's imposition of these costly and burdensome TMDLs is based on a blatant misconstruction of the statutory text. Section 303(d)(1)(A) plainly excludes waters not subject to point source pollution from the mandatory TMDL program. See Pet. 8-11. EPA's assertion that § 303(d)(1) does not refer to "point sources" or contain any "limiting language" is mere bluster. U.S. Br. 11 n.1. Congress restricted the class of waters subject to mandatory TMDLs to waters subject to "effluent limitations," which by definition apply only to point sources. That limiting language cannot be excised from the statute by governmental fiat. The government's attempt to recast mandatory TMDLs as mere sources of information also disregards the critical distinction between the § 303(d)(1) list of waters subject to mandatory TMDLs and the § 303(d)(3) list of waters for which States are to "estimate" TMDLs "[f]or the specific purpose of

[1] http://www.sso.org/ecos/projects/cleanwater/tmdlcomments.htm.

developing information." 33 U.S.C. § 1313(d)(3). See Pet. 12.[2]

The government's "common-sense understanding" of § 303(d)(1)(A) makes no sense at all. U.S. Br. 10. EPA contends that each State must identify "all waters" within its boundaries and then "exclude those waters that will attain the applicable water quality standards through application of effluent limitations." *Ibid.* In other words, first identify "all waters," then prune that list to "all sub-standard waters," and forget about the waters actually specified in § 303(d)(1)(A). That is an impermissible re-write of the statute. Section 303(d)(1)(A) does not require the identification of "all waters" or "all sub-standard waters" within a State's boundaries. Instead, Congress directed the States to identify a sub-class of sub-standard waters—those "for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough" to implement applicable water quality standards. The government closes its eyes when it comes to the "effluent limitations" restriction.

Statutes are not to be construed in a "strained" manner. *Dole Food Co.* v. *Patrickson*, 123 S. Ct. 1655, 1661 (2003). Why would Congress even attempt to define the class of sub-standard waters if the mandatory TMDL list was to include *all* sub-standard waters? Why would Congress define the waters to be listed by reference to particular effluent limitations if it meant to include waters not subject to effluent limitations at all? The government

---

[2] If Congress viewed TMDLs as the "informational tools" described by the government, it presumably would have included § 303(d)(1) among the Clean Water Act provisions specifically listed in § 319(a)(2) as useful sources of information for the States' development of water quality assessment reports. See 33 U.S.C. § 1329(a)(2).

cannot and has not even attempted to answer these fundamental questions.

EPA finds it irrational that waters polluted by a single point source would be treated differently from waters polluted only by nonpoint sources. U.S. Br. 11. But what EPA calls irrational is actually Congress's federalist division of labor in the fight against water pollution. The 1972 Congress reasonably mandated TMDLs for point source impaired waters for which specified technological controls are insufficient to achieve water quality standards, while allocating control over nonpoint source impaired waters to the States through § 208 regional waste treatment management plans. Far from being irrational, limiting the authority of the federal government in such fashion was a plausible policy choice and consistent with the States' traditional authority over local land uses and with constitutional standards. See Pet. 24.[3]

4. EPA's current position is of recent vintage. For decades after enactment, EPA construed § 303(d)(1) to apply only to waters impaired by point sources. See Pet. 17-18. Although the government asserts that EPA's current

---

[3] Whether § 303(d)(1) applies to blended waters—those impaired by both point source and nonpoint source pollution—is not at issue in this case. Thus, there is no need for what could only be an advisory opinion on that issue here. Petitioners suggest, however, that once the inapplicability of § 303(d)(1) to waters impaired only by nonpoint sources is confirmed, the treatment of blended waters will be plain. Section 303(d)(1)(A) requires identification of all waters impaired by point source pollution, which would include blended waters, but TMDLs for such waters may appropriately allocate maximum loads only to point sources. See *EPA* v. *California*, 426 U.S. 200, 205 n.12 (1976) (water quality standards serve to supplement effluent limitations by further regulating point sources).

construction of § 303(d)(1) is longstanding, it points to no statement by EPA (or anyone else) prior to the 1990s that § 303(d)(1) applies to waters impaired solely by nonpoint sources. Instead, the government simply repeats the unsupported assertion of the court below that EPA's initial regulations implementing the 1972 Act "quite clearly" required States to list "waters polluted only by nonpoint sources." U.S. Br. 12.

The court below, however, pointed to no such "clear" statement. It cited (without quotation) a published EPA Notice from 1978 (Pet. App. 17a), but that Notice did not address whether § 303(d)(1) applies to waters impaired only by nonpoint sources. Its stated and sole purpose was "to finalize EPA's *identification of pollutants* suitable for total maximum daily load calculations," as required by section 304(a)(2) of the 1972 Act. 43 Fed. Reg. 60662, 60662 (1978) (emphasis added). The Notice stressed that "the proposed identification of pollutants is not intended to require States to devote additional resources to TMDL and wasteload allocation development." *Ibid.* The Notice said nothing at all about whether waters impaired only by nonpoint sources were subject to mandatory loads.

Furthermore, the government simply disregards statement after statement by EPA after enactment that refute its current position, such as EPA's 1985 statement that "[w]e think it is clear from the Act that TMDLs are appropriate wherever effluent limitations are necessary to meet water quality standards." 50 Fed. Reg. 1774, 1778 (1985). That statement cannot be reconciled with EPA's current view that TMDLs are appropriate for waters to which effluent limitations do not apply at all. The government also disregards the fact that EPA's 1987 guide to the States' role in fighting nonpoint source pollution did not even mention TMDLs or § 303(d). See Pet. 17. It also

has no explanation for EPA's 1997 memorandum acknowledging that, as of that late date, it had "not yet address[ed] implementation of TMDLs for waters impaired only by nonpoint sources." ER-91 Ex. 7, at 5. That 1997 memorandum represented "the first time" EPA applied section 303(d)(1) "to exclusively nonpoint waters." Houck, THE CLEAN WATER ACT TMDL PROGRAM 61-62 (1999). These contemporaneous statements and omissions provide a far better indication of the meaning of § 303(d)(1) than EPA's current litigation posture.[4]

In similar fashion, the government dismisses without addressing consistent references to "point sources" in the relevant legislative history of § 303(d). See U.S. Br. 12 n.2; Pet. 14. In contrast to the abundant statements that Congress intended TMDLs to aid in imposing more stringent effluent limitations on these point sources (see Pet. 14), EPA offers no suggestion from anyone in Congress that TMDLs were intended to apply to waters impaired only by nonpoint sources.

The critical point here is less what is in the legislative and administrative history than what is not. For decades after enactment, there was *not a single mention* of employing TMDLs for waters impaired solely by nonpoint sources in the numerous Congressional hearings and debates on the Clean Water Act, in EPA's extensive regulations and publications, or in academic commentary.

---

[4] In a March 28, 2003 letter to the Oregon Department of Environmental Quality, EPA admitted that its current construction of § 303(d)(1) was developed only in the 1990s, stating: "For more than a decade, EPA's position has consistently been that nonpoint source impaired waters are covered by the TMDL program." EPA would not have temporally limited its position to one decade if it had held a similar view in the 1970s or 1980s.

See Pet. 21 n.5. If there were any such mention, the government or one of the respondents would have quoted it. Like "the dog that did not bark" (*Chisom* v. *Roemer*, 501 U.S. 380, 396 n.23 (1991)), this silence is deafening.

5. The construction of § 303(d)(1) adopted by EPA and the court below is so at odds with the text of that provision that it can be explained only by a desire to achieve a particular policy result rather than give effect to the intent of Congress. EPA's construction reflects a desire to assert federal control over all aspects of the fight against water pollution, even those that Congress plainly reserved for the States. Rather than rein in EPA's foray into local land use regulation, the court below first accorded deference to EPA and only then turned to the text of the statute to attempt to justify its deference. See Pet. 7-8. Although the government denies that the court below put the deference cart before the statutory horse, it acknowledges that the Ninth Circuit addressed the deference issue "at the outset" of its opinion and only then turned to the statutory language. U.S. Br. 9. The petition should be granted to ensure that § 303(d)(1) is construed and implemented based on the statutory text rather than on EPA's policy predilections. See *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 172-173 (2001).

No one is proposing that nonpoint source pollution is insignificant or need not be addressed. In sections 208 and 319, Congress chose specific means to address nonpoint source pollution that are sensitive to State primacy in this area. EPA and the States have demonstrated their ability to control nonpoint source pollution and improve water quality by partnering on State-led programs without imposing TMDLs on nonpoint source impaired waters. See EPA, *Section 319 Success Stories Volume III: The*

Successful Implementation of the Clean Water Act's Section 319 Nonpoint Source Pollution Program.[5] EPA's attempt to expand mandatory TMDLs into waters impaired only by nonpoint sources is not only unauthorized but unnecessary.

Respectfully submitted.

TIMOTHY S. BISHOP
SUSAN E. BRICE
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

JOHN J. RADEMACHER
American Farm Bureau Federation
225 Touhy Avenue
Park Ridge, IL 60068
(847) 685-8600

JEFFREY W. SARLES
Counsel of Record
RUSSELL R. EGGERT
CRISTINA CARMODY TILLEY
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

NANCY N. MCDONOUGH
California Farm Bureau Federation
2300 River Plaza Drive
Sacramento, CA 95833
(916) 561-5500

MAY 2003

---

[5] http://www.epa.gov/owow/nps/Section319III.